Supreme Court, U.S.
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In The

Supreme Court of the United States

SUSAN B. HERSH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

HOWARD MARC SPECTOR
Counsel of Record

12770 Coit Road
Banner Place, Suite 1100
Dallas, Texas 75251
(214) 365-5377
(214) 237-3380 (fax)

Attorney for Petitioner

March 18, 2009

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the First Amendment prohibits Congress from imposing a civil penalty on an attorney based upon that attorney's provision of advice to a client concerning that client's lawful legal strategies.

2. Whether attorney advice given within an attorney-client relationship is entitled to First Amendment protections afforded other types of highly-protected speech.

RULE 29.6 STATEMENT

Petitioner Susan B. Hersh and Respondent United States of America are not business entities and thus no corporate affiliations need be disclosed.

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INTRODUCTION

In a case that has drawn the attention – and triggered the deep concern – of the bar nationwide, the Fifth Circuit has profoundly upset settled understandings of the attorney-client relationship. Instead of holding that 11 U.S.C. § 526(a)(4)'s restrictions on attorney advice facially violate the First Amendment, the Fifth Circuit has rewritten the statute to apply only to instances of "abuse of the bankruptcy system," despite the fact that no statutory language supports the Fifth Circuit's interpretation. Only by overlaying the statute with an undefined "abuse of the bankruptcy system" exception, was the Fifth Circuit able to avoid the Constitutional question presented – whether 11 U.S.C. § 526(a)(4)'s unambiguous blanket restriction on legal advice to incur more debt in contemplation of a bankruptcy filing violates the First Amendment.

The Fifth Circuit's cure is worse than the disease. Under the Fifth Circuit's holding, attorneys providing bankruptcy advice are now faced with impossibly confusing alternatives. They are responsible for providing the best possible representation to their clients and advising clients of all legally-permissible options. At the same time, the decision of the Fifth Circuit requires them to tailor their advice *ex ante* to avoid counsel which might later be determined to constitute an "abuse of the bankruptcy system," notwithstanding that "abuse of the bankruptcy system" is not defined in either 11 U.S.C. § 526(a)(4) or elsewhere in the Bankruptcy Code.

This Court has never explicitly ruled on the degree of First Amendment protection afforded to advice given within the context of the attorney-client relationship. Given the importance of that relationship in the Constitutional system, Petitioner submits that attorney advice to clients must be afforded the highest level of protection under the First Amendment. Subjecting attorneys to liability under a vague and nebulous standard, such as the one created by the Fifth Circuit, will have an unacceptably chilling effect on attorneys, thus undermining the public's reliance on their attorneys and the judicial system as a whole.

OPINIONS BELOW

The Order granting Petitioner's Summary Judgment Motion of the United States District Court for the Northern District of Texas (per Godbey, J.) is reprinted at App. 59, and is not published. The Memorandum Opinion and Order granting in part and denying in part the Respondent's Motion to Dismiss is reprinted at App. 61, and is published at 347 B.R. 19. The Fifth Circuit's decision (per Garwood, J., joined by Clement and Elrod, JJ.) reversing in part and affirming in part the rulings of the District Court is reprinted at App. 1 and is published at 553 F.3d 743.

JURISDICTION

The Fifth Circuit rendered its decision on December 18, 2008. Petitioner did not request rehearing. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment to the United States Constitution provides,

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. 11 U.S.C. § 526(a) provides,

A debt relief agency shall not –

(1) fail to perform any service that such agency informed an assisted person or prospective assisted person it would provide in connection with a case or proceeding under this title;

(2) make any statement, or counsel or advise any assisted person or prospective assisted person to make a statement in a document filed in a case or proceeding under this title, that is untrue and misleading, or that upon the exercise of reasonable care,

should have been known by such agency to be untrue or misleading;

(3) misrepresent to any assisted person or prospective assisted person, directly or indirectly, affirmatively or by material omission, with respect to –

(A) the services that such agency will provide to such person; or

(B) the benefits and risks that may result if such person becomes a debtor in a case under this title; or

(4) advise an assisted person or prospective assisted person to incur more debt in contemplation of such person filing a case under this title or to pay an attorney or bankruptcy petition preparer fee or charge for services performed as part of preparing for or representing a debtor in a case under this title.

STATEMENT OF THE CASE

Petitioner is an attorney who represents consumer debtors in bankruptcy. Shortly after the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (Pub. L. 109-8, 119 Stat. 23, enacted April 20, 2005 and hereinafter the "Act"), Petitioner filed suit against the United States, seeking declaratory and injunctive relief to prohibit federal officials from enforcing the Act's professional conduct provisions against licensed

attorneys. Petitioner later amended her complaint to allege that attorneys are not "debt relief agencies" within the meaning of the Bankruptcy Code. She further claimed that, to the extent attorneys are considered debt relief agencies, the professional conduct restrictions in 11 U.S.C. § 526(a)(4) and the disclosure requirements of 11 U.S.C. § 527 violate the First Amendment.[1] Finally, Petitioner contended that both provisions unconstitutionally invaded her clients' Fifth Amendment right to counsel in a civil matter.

Petitioner's evidence included testimony that:

(i) Petitioner intends to engage in protected speech or expressive conduct that violates the statute at issue;

(ii) that 11 U.S.C. § 526(a)(4) facially prohibits a wide range of legally permissible, ethical, advisable conduct that may be critical to Petitioner's fulfillment of her ethical obligations to Petitioner's clients, yet would not result in any adverse bankruptcy implications such as denial of a discharge, dischargeability litigation, and would not affect the ratable distribution to creditors;

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[1] Only Petitioner's claims relative to 11 U.S.C. § 526(a)(4) are the subject of this Petition.

(iii) that if Petitioner advised clients to incur more debt in contemplation of a bankruptcy filing, 11 U.S.C. § 526(a)(4) imposes the potential for the imposition of civil penalties and damages in suits brought by the United States;

(iv) that 11 U.S.C. § 526(a)(4) unconstitutionally infringes upon Petitioner's speech and Petitioner's ability to fulfill Petitioner's ethical obligations to Petitioner's clients to provide complete and competent legal advice, assistance and counseling as to lawful actions, rights, and benefits;

(v) that failure to provide such advice would violate Petitioner's professional obligation under the Code of Professional Responsibility, and Petitioner's obligation of due care to her clients;

(vi) that, in view of the threat of civil punishment, Petitioner is forced to provide advice, assist and counsel with caution, clearly avoiding or giving wide berth to the areas which might result in the imposition of civil penalties, thereby depriving Petitioner's clients of legitimate and legal advice that would best serve Petitioner's clients' interests;

(vii) that as a result of 11 U.S.C. § 526(a)(4)'s improper infringement on her speech, Petitioner is put at risk of

not providing proper legal advice to Petitioner's clients, which may result in Petitioner being accused of malpractice;

(viii) that by imposing civil penalties, the statutes place Petitioner at odds with her obligations to dispense unvarnished legal advice to Petitioner's clients regarding all of their legally-permissible options, and accordingly, they deprive Petitioner of her rights under the First Amendment;

(ix) that the existence of the unconstitutional law deters or chills the exercise of free speech rights and causes continuing harm or a real and immediate threat of future injury;

(x) that 11 U.S.C. § 526(a)(4) has had a chilling effect on Petitioner and has exerted significant pressure on Petitioner not to advise her clients to incur more debt in the contemplation of a bankruptcy filing;

(xi) that the statute has forced Petitioner into the untenable position of either violating federal law or committing possible malpractice; and

(xii) that no monetary award can adequately compensate Petitioner for the harm threatened by 11 U.S.C. § 526(a)(4).

The legal sufficiency of Petitioner's evidence in support of the judgment rendered in Petitioner's favor by the District Court under 11 U.S.C. § 526(a)(4) was not disputed.

In July 2006, the District Court dismissed Petitioner's challenge to 11 U.S.C. § 527, as well as her effort to assert Fifth Amendment claims on behalf of her prospective clients, but refused to dismiss Petitioner's First Amendment challenge to 11 U.S.C. § 526(a)(4). App. 61 *et seq*. As a threshold matter, the District Court found that the "plain meaning" of the Bankruptcy Code forecloses Petitioner's assertion that the term "debt relief agency" does not encompass attorneys. App. 63-64. The District Court also rejected Petitioner's Constitutional challenge to the disclosure requirements of 11 U.S.C. § 527, reasoning that the government "has a legitimate interest in attempting to ensure that a client is informed of certain basic information before he or she commences a case in bankruptcy." App. 75. The District Court further held that Petitioner lacks standing to challenge the debt relief agency provisions as an infringement on her prospective clients' Fifth Amendment right to counsel. App. 77-78. The District Court declined, however, to dismiss Petitioner's challenge to 11 U.S.C. § 526(a)(4), which the court regarded as facially invalid under the First Amendment. The court did not dispute that Congress designed 11 U.S.C. § 526(a)(4) to "end the manipulation of the [bankruptcy] system by certain filers who took on additional debt prior to bankruptcy." Nevertheless, in

the District Court's view, 11 U.S.C. § 526(a)(4) "prevents lawyers from giving their clients their best advice," because in some cases "taking on more debt could be the most financially prudent option for someone considering bankruptcy." App. 69.

In December 2006, the District Court granted plaintiff's motion for summary judgment and issued a permanent injunction barring the United States from enforcing 11 U.S.C. § 526(a)(4). App. 57-60.

Both parties to the case appealed to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit affirmed the District Court's rulings on all issues except with respect to Petitioner's First Amendment challenge to 11 U.S.C. § 526(a)(4). On that claim, the Fifth Circuit invoked the doctrine of "constitutional avoidance" and employed an extra-textual limiting construction of the statute. Under the Fifth Circuit's construction, the Fifth Circuit held that 11 U.S.C. § 526(a)(4) was not facially invalid as Petitioner alleged. App. 1 *et seq.*

REASONS FOR GRANTING THE WRIT

The Petition should be granted (i) to resolve a sharp conflict among federal circuit courts as to whether 11 U.S.C. § 526(a)(4) is facially invalid; (ii) to squarely address, for the first time, the level of First Amendment protection afforded to attorney advice provided within the confines of an attorney-client relationship; and (iii) to prevent intrusion into the

function of the judiciary through Acts of Congress which financially penalize attorneys from presenting well-grounded arguments in cases or controversies.

a. Attorney Advice Is Critical to a Properly-Functioning Judicial System. The attorney-client relationship has occupied a privileged place in the law since the Roman Republic. This status continued into Anglo-American law dating back as far as the reign of Elizabeth I in the 16th century. Epstein, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 2 (4th ed. 2001).

This Court has recognized that the attorney-client relationship serves to support the goal of "sound legal advice [and] advocacy," *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) by encouraging clients to speak frankly and openly to legal counsel. Candor and honesty better equip attorneys to "satisfy all of their professional responsibilities, uphold their duties of good faith and loyalty to the client, and [contribute] to the efficient administration of justice." King, *Preserving the Attorney-Client Privilege in the Corporate Environment*, 53 ALA. L. REV. 621, 622 (2002) (citing *Upjohn*, 449 U.S. at 391 (quoting Model Code of Prof'l Responsibility EC 4-1 (1980))).

Laws which inhibit, or as in this case, which impose monetary penalties upon, attorneys dispensing particular categories of advice are dangerous. They curtail the recommendation of certain legal strategies to clients, thereby truncating the presentation of such

strategies to the courts and preventing the very speech and expression upon which courts must depend for the proper exercise of the judicial power. *Legal Services Corporation v. Velazquez,* 531 U.S. 533 (2001). Unless it enacts a law proscribing certain conduct, Congress has no governmental interest in discouraging attorneys from dispensing advice concerning that very conduct.

11 U.S.C. § 526(a)(4) illustrates this point. Under the statute as drafted, it is entirely possible for an attorney to dispense lawful, prudent advice to a client contemplating bankruptcy (*e.g.*, to purchase a more reliable car on credit prior to bankruptcy) and, at the same time, run afoul of the statute and risk monetary sanction. The statute thus financially threatens attorneys who advise their clients as to when to, whether to, and the reasons for, incurring new debt "in contemplation of" a bankruptcy filing, without regard to the propriety of the advice. This, in turn, creates an untenable conflict for the attorney, forcing a choice between fulfilling his obligation to the client to provide information about all possible lawful strategies (including those which may extend the boundaries of law) and the attorney's own financial interest if his advice crosses the statutory barrier. As this Court recognized in *Legal Services*, limited advice leads to limited court consideration of legitimate areas of legal debate (*e.g.*, when debts can legitimately be incurred "in contemplation of" a bankruptcy filing and the effect of such new debts on a debtor's repayment plan, a debtor's discharge and

the bankruptcy process as a whole). With statutes such as 11 U.S.C. § 526(a)(4) in force, the courts and the public would have reason to doubt the adequacy and fairness of advice provided by bankruptcy attorneys.

b. No Clear Standard Exists to Evaluate Regulations on Attorney Advice. This Court has repeatedly been asked to evaluate the First Amendment rights of attorneys outside of the strict attorney-client relationship. In so doing, the Court has both circumscribed and protected attorneys' speech in the area of public comment, *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991); solicitation of business through direct, in-person communication with prospective clients, *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447 (1978); newspaper or other media advertising of their services, *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); advertising of qualifications, *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91 (1990); targeted solicitations of potential clients, *Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995); and recruitment of potential clients for the purpose of furthering a specific political objective, *In re Primus*, 436 U.S. 412 (1978).

However, in determining the constitutionality of restrictions on an attorney's advice, lower courts have been stymied in their attempts to utilize the foregoing precedents to examine whether attorney advice can be regulated under less than so-called strict scrutiny. For example, the District Court in this case found that any restriction on attorney advice was required

to be "narrow" whether or not it evaluated 11 U.S.C. § 526(a)(4) under *Gentile's* "intermediate scrutiny" standard or strict scrutiny. App. 68. Four other lower courts, including the Eighth Circuit, have also been unable to determine which standard of review applies to attorney advice, but have found 11 U.S.C. § 526(a)(4) to be substantially overbroad, and thus facially unconstitutional. *Milavetz v. U.S.*, 541 F.3d 785 (8th Cir. 2008); *Connecticut Bar Association v. U.S.*, 394 B.R. 274 (D. Conn. 2008); *Olsen v. Gonzales*, 350 B.R. 906 (D. Ore. 2006); *Zelotes v. Adams*, 363 B.R. 660 (D. Conn. 2007).

Like the decisions of lower courts referenced above, the Fifth Circuit's opinion in the case at bar fails to determine the applicable standard of First Amendment protection afforded to attorney advice. Instead, the Fifth Circuit invoked the principle of constitutional avoidance[2] in evaluating 11 U.S.C. § 526(a)(4). Recognizing that 11 U.S.C. § 526(a)(4), if interpreted literally, "would raise serious constitutional problems" because it would restrict some speech that is protected by the First Amendment, the Fifth Circuit chose to rely on extra-textual limiting language which circumscribes 11 U.S.C. § 526(a)(4)'s

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[2] *Zadvydas v. Davis*, 533 U.S. 678 (2001) ("'[I]t is a cardinal principle' of statutory interpretation . . . that when an Act of Congress raises 'a serious doubt' as to its constitutionality, 'this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'" (quoting *Crowell v. Benson*, 285 U.S. 22 (1932))).

regulatory effect to cover only attorney advice which encourages "abuse of the bankruptcy system."

The Fifth Circuit's thus "saved" a facially overbroad statute by creating an impossibly amorphous one. Although the Fifth Circuit's opinion analogizes "abuse of the bankruptcy system" to fraud or criminal acts, "abuse of the bankruptcy system" has no elements, no pattern jury charge, no statutory foundation whatsoever. This Court has made clear that highly-protected speech can only be the subject of precise regulation. *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997). The "abuse of the bankruptcy system" standard cannot possibly meet this requirement since it is entirely a judicially-created criterion. Stated another way, by adopting vague limiting language (compliance with which can only be determined *ex post* and *ad hoc*) in an attempt to save the statue, the Fifth Circuit has employed a standard which is only even potentially permissible when the speech in question is entitled to low-level or intermediate-level scrutiny. The Fifth Circuit's opinion in the case at bar thus constitutes an implicit determination that attorney advice is not subject only to narrow and precise regulations, and is therefore not highly protected speech.

The Court can (and should) clarify the relevance, if any, of *Gentile* and other attorney speech cases to situations that involve speech within specific attorney-client relationships. It is of central importance to our nation's adversarial system that attorneys not be sanctioned for providing legal counsel which is

directed at lawful ends. Nor should they be exposed to penalties contained in a law bounded only by judicially-created catchphrases such as "abuse of the bankruptcy system."

CONCLUSION

For the foregoing reasons, Petitioner submits that this Court should grant review to provide much-needed guidance on the First Amendment protections afforded attorney advice.

Respectfully submitted,

HOWARD MARC SPECTOR
Counsel of Record

12770 Coit Road
Banner Place, Suite 1100
Dallas, Texas 75251
(214) 365-5377
(214) 237-3380 (fax)

Attorney for Petitioner

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 07-10226

SUSAN B. HERSH,

Plaintiff-Appellee-Cross-Appellant,

v.

UNITED STATES OF AMERICA, by and through Michael Mukasey in his capacity as Attorney General of the United States,

Defendant-Appellant-Cross-Appellee.

Appeal from the United States District Court for the Northern District of Texas

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(Filed Dec. 18, 2008)

Before GARWOOD, CLEMENT and ELROD, Circuit Judges.

GARWOOD, Circuit Judge:

Defendant-appellant-cross-appellee, the United States, by and through Attorney General Michael Mukasey, appeals the decision of the United States District Court for the Northern District of Texas holding a recently enacted provision of the Bankruptcy Code, 11 U.S.C. § 526(a)(4), facially unconstitutional. *See Hersh v. United States*, 347 B.R. 19

(N.D. Tex. 2006). Plaintiff-appellee-cross-appellant, Susan B. Hersh, cross-appeals the district court's holding that attorneys qualify as "debt relief agencies" under 11 U.S.C. § 101(12A), and that 11 U.S.C. § 527(b) does not violate the First Amendment. For the reasons stated below, we affirm the district court's holdings that attorneys qualify as debt relief agencies and that 11 U.S.C. § 527(b) is constitutional, but reverse the court's judgment as far as it holds 11 U.S.C. § 526(a)(4) facially unconstitutional.

FACTS AND PROCEEDINGS BELOW

In 2005, Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act (the BAPCPA), Pub. L. No. 109-8, 119 Stat. 23 (2005). The BAPCPA is a "comprehensive package of reform measures" designed "to improve bankruptcy law and practice by restoring personal responsibility and integrity in the bankruptcy system and [to] ensure that the system is fair for both debtors and creditors." H.R. REP. NO. 109-31(I), 109th Cong. 1st Sess. pt. 1, at 2 (2005), *reprinted in* 2005 U.S.C.C.A.N. Vol. 4 at 88, 89 [hereinafter HOUSE REPORT]. The act contains provisions that apply to "debt relief agencies" – defined, as we hold, to include attorneys – that counsel consumer debtors, and regulate the manner in which they provide services to their clients. *See* 11 U.S.C. §§ 526-528.

Hersh is an attorney who represents consumer debtors in bankruptcy proceedings. For nineteen

years, she has counseled her clients for a fee regarding their eligibility for filing for bankruptcy, the acquisition and disposition of property, and other legal rights and responsibilities relating to financial difficulties. Soon after the BAPCPA took effect, on November 28, 2005, Hersh filed this suit against the United States, then United States Attorney General Alberto Gonzales,[1] the State of Texas, and Texas Attorney General Greg Abbot. The State of Texas and Greg Abbott did not in any way appear and were not served with process and accordingly were dismissed from the case by the district court, so the only named defendants below who are parties to this appeal are the United States and United States Attorney General Michael Mukasey (collectively, the Government).[2]

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[1] Michael Mukasey became Attorney General on November 9, 2007. Under Federal Rule of Appellate Procedure 43(c)(2), when a public officer party to an appeal in an official capacity ceases to hold office, his successor is automatically substituted as a party. Proceedings that follow the substitution are made in the name of the substituted party, here Michael Mukasey.

[2] In its Final Judgment of December 15, 2006, the district court stated that "unless Plaintiff Hersh shows good cause within thirty (30) days of the date of this Order for her failure to effect service on Defendant State of Texas, the Court will dismiss her claims against that defendant without prejudice." There is no indication in the record or briefs that Hersh ever submitted such a statement of good cause. Thus, we presume that Hersh's claims against the State of Texas and the Attorney General have been dismissed, and neither is a party to this appeal.

In her original complaint, Hersh sought declaratory and injunctive relief to prohibit the Government from enforcing 11 U.S.C. §§ 526,[3] 527, and 528. She then amended her complaint to allege that attorneys do not qualify as "debt relief agencies" under the Bankruptcy Code. Hersh argued that sections 526(a)(4) and 527(b) violate the First Amendment right to free speech and her clients' Fifth Amendment right to counsel in a civil case.[4] In this appeal, Hersh challenges the applicability of the BAPCPA to bankruptcy attorneys by arguing that attorneys do not qualify as "debt relief agencies" as that term is defined in the act. She also argues that 11 U.S.C. §§ 526(a)(4) and 527(b) are unconstitutional in violation of the First Amendment.

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[3] Though Hersh's original and first amended complaints do not mention 11 U.S.C. § 526, both Hersh and the Government argued the constitutionality of section 526 extensively in proceedings below. *See Hersh*, 347 B.R. at 21 n.1. Thus, the district court addressed the constitutionality of section 526(a)(4) in its Memorandum Opinion and Order of July 26, 2006, and granted Hersh leave to amend her complaint to include an express claim for relief that section 526(a)(4) violates the First Amendment. Hersh then asserted in her Second Amended Complaint claims pertaining to § 526(a)(4). After this, she filed a motion for summary judgment on the issue of the constitutionality of § 526(a)(4) on October 24, 2006, which the district court granted in an order dated December 15, 2006.

[4] She also made claims regarding the constitutionality of § 528, which were dismissed by the district court and have not been raised on appeal. *Hersh*, 347 B.R. at 22 n.2.

Sections 526(a)(4) and 527(b) govern the conduct of "debt relief agencies." Hersh argues that these statutes should not apply to her because, as an attorney, she does not qualify as a debt relief agency. "Debt relief agency" is defined in the BAPCPA as "any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration, or who is a bankruptcy petition preparer under section 110. . . . " 11 U.S.C. § 101(12A). An "assisted person" is "any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than $164,250." *Id.* § 101(3).

In enacting the BAPCPA, Congress responded to evidence that attorneys and other bankruptcy professionals often played a role in abusing the bankruptcy system. *See* HOUSE REPORT at 5. Section 526(a)(4) is meant to curb this abuse by prohibiting debt relief agencies from advising assisted persons to incur debt "in contemplation of" bankruptcy or to incur debt to pay attorney or bankruptcy petition preparer fees. Hersh contends that section 526(a)(4) is facially unconstitutional in violation of the First Amendment because it impairs her right to provide legal advice to her clients, and chills and punishes speech that is fundamental to the attorney-client relationship. She asserts that she intends to engage in speech that violates this statute by advising her clients to incur debt in contemplation of bankruptcy when doing so would be in good faith and not abusive of the bankruptcy system.

Section 527(b) was enacted with the intention of providing debtors who are thinking about filing for bankruptcy with certain basic information about the bankruptcy system. It requires debt relief agencies to disclose specific basic information about bankruptcy to assisted persons whom they are counseling through the bankruptcy process. Hersh argues on appeal that section 527(b) violates the First Amendment by compelling her to provide factual information to her clients that is false and misleading, even when it is not pertinent to her client.

Hersh does not claim that the government or any individual debtor (or any other person or organization whatever) has threatened to enforce either section 526 or 527 against her on any occasion. She does not assert that the government or any official has issued any bulletin or statement (or made any threat to anyone) indicating that it will in any way punish (or take any adverse action against) her or any other debt relief agency in her position if she or they take the actions that she alleges she plans to take in her legal practice. She simply conclusorily asserts that if she violates section 526(a)(4), she faces a "threat of civil punishment" for advising her client to take legitimate actions that are prohibited by the statute, and that the statute of itself has a "chilling effect" on her communications with her clients. She also contends that the civil penalties for violating sections 526(a)(4) and 527(b) "deter[ ] or chill[ ] the exercise of free speech rights and cause[ ] continuing harm or a real and immediate threat of future injury." *See Sec'y*

of State v. Joseph H. Munson Co., 104 S.Ct. 2839, 2847 (1984) ("[W]hen there is a danger of chilling free speech, the concern that constitutional adjudication be avoided whenever possible may be outweighed by society's interest in having the statute challenged.").

After Hersh filed suit against the Government on November 28, 2005, the Government responded to Hersh's complaints by filing a motion to dismiss all of Hersh's claims under Federal Rule of Civil Procedure 12(b)(6) on February 2, 2006. On July 26, 2006, the district court issued a Memorandum Opinion and Order in response to the Government's Motion to Dismiss Hersh's claim. *Hersh,* 347 B.R. 19. It held that section 526(a)(4) is facially unconstitutional in violation of the First Amendment, but granted the Government's motion to dismiss for all of Hersh's other claims. *Id.* at 21. It dismissed Hersh's claim that attorneys advising clients on bankruptcy issues are not "debt relief agencies" as defined in 11 U.S.C. § 101(12A) because the plain meaning of the statute indicates that the term includes bankruptcy attorneys. *Id.* at 22-23. It held that section 526(a)(4) violates the First Amendment because it "imposes limitations on speech beyond what is 'narrow and necessary,'" and invited Hersh to move for summary judgment on that claim once she amended her complaint to assert it explicitly. *Id.* at 25, 28; *see also* note 3, *supra.* It dismissed Hersh's challenge to section 527(b) because the statute "advances a sufficiently compelling government interest and does not unduly burden either the attorney-client relationship or the

ability of a client to seek bankruptcy." Hersh, 347 B.R. at 27. Finally, the district court held that Hersh does not have standing to assert her Fifth Amendment claims. *Id.* at 28.

After the district court issued this opinion, Hersh filed a motion for summary judgment regarding her section 526(a)(4) claim, which the district court granted on December 15, 2006. It ordered that "Hersh have declaratory judgment that 11 U.S.C. § 526(a)(4) violates the First Amendment." It also ordered that "Defendant United States, its agents, and all people acting in active concert with it are permanently enjoined from enforcement of 11 U.S.C. § 526(a)(4)."

The Government timely appealed the district court's judgment that section 526(a)(4) violates the First Amendment, and Hersh thereafter timely cross-appealed the court's holdings that attorneys qualify as "debt relief agencies" under section 101(12A) and that section 527(b) does not violate the First Amendment.

DISCUSSION

We limit our discussion to the issues raised on appeal: whether attorneys qualify as "debt relief agencies" under 11 U.S.C. § 101(12A); whether 11 U.S.C. § 526(a)(4) is wholly invalid as a facially unconstitutional violation of the First Amendment; and whether 11 U.S.C. § 527(b) unconstitutionally compels speech in violation of the First Amendment. For the reasons stated below, we affirm the judgment

of the district court insofar as far as it holds that attorneys are debt relief agencies and that section 527(b) does not violate the First Amendment. We reverse the judgment of the district court on Hersh's section 526(a)(4) claim, and hold that section 526(a)(4) is not facially unconstitutional.

I. Whether attorneys are "debt relief agencies" under 11 U.S.C. § 101(12A)

Hersh argues that the district court erred in holding that attorneys may qualify as "debt relief agencies" under 11 U.S.C. § 101(12A). This is important because a debt relief agency must comply with the terms of certain provisions of the Bankruptcy Code such as those here at issue, sections 526 and 527. The district court granted the Government's motion to dismiss Hersh's claim that the term "debt relief agency" does not include bankruptcy attorneys. *Hersh*, 347 B.R. at 23.

The only federal court of appeals to have addressed that issue, namely the Eighth Circuit in its September 4, 2008 decision in *Milavetz, Gallop & Milavetz, P.A., et al. v. United States*, 541 F.3d 785 (8th Cir. 2008) (hereafter "*Milavetz*"), has held that "attorneys that provide 'bankruptcy assistance' to 'assisted persons' are 'debt relief agencies' as that

term is defined by the Code." Id. at 792.[5] We agree with that holding.[6]

"Debt relief agency" is defined by 11 U.S.C. § 101(12A) as "any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration, or who is a bankruptcy petition preparer under section 110. . . . "[7] "Bankruptcy assistance" is defined as:

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[5] This issue also has been addressed by a handful of federal district courts, and there has been no consensus regarding whether attorneys should be considered "debt relief agencies." *See Olsen v. Gonzales,* 350 B.R. 906, 912 (D. Or. 2006), *aff'd on reconsideration,* 368 B.R. 886 (D. Or. 2007) ("[I]t is the plain language of the Act that leads to the conclusion that attorneys are to be included in the definition of 'debt relief agency.'"); *In re Reyes,* 361 B.R. 276, 280 (Bankr. S.D. Fla. 2007) ("[T]he Court does not believe Congress intended the scope of [11 U.S.C. § 101(12A)] to include attorneys."); *In re Attorneys at Law and Debt Relief Agencies,* 332 B.R. 66, 71 (Bankr. S.D. Ga. 2005) (holding that attorneys who are members of the bar of the Bankruptcy Court for the Southern District of Georgia and those admitted *pro hac vice* are not "debt relief agencies" under BAPCPA as long as their activities consist of practicing law, and do not constitute a separate commercial enterprise).

[6] The *Milavetz* panel was unanimous on that issue (and also in its upholding of 11 U.S.C. §§ 528(a)(4) and 528(b)(2), which sections are not at issue on this appeal, *see* note 4, *supra*). The *Milavetz* panel was divided on the issue of the constitutionality of § 526(a)(4); as to that issue we agree with Judge Colloton's dissenting opinion, as explained below.

[7] The statute goes on to list five exceptions ("but does not include") to the definition of "debt relief agency":

(Continued on following page)

> "any goods or services sold or otherwise provided to an assisted person with the express or implied purpose of providing information, advice, counsel, document preparation, or filing, or attendance at a creditors' meeting or appearing in a case or proceeding on behalf of another or *providing legal representation* with respect to a case or proceeding under this title." 11 U.S.C. § 101(4A) (emphasis added).

The district court correctly concluded that under the plain language of 11 U.S.C. § 101(12A), attorneys qualify as "debt relief agencies." Although the definition does not explicitly include attorneys, it also does not exclude them in the list of exclusions provided

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"(A) any person who is an officer, director, employee, or agent of a person who provides such assistance or of the bankruptcy petition preparer;

(B) a nonprofit organization that is exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986;

(C) a creditor of such assisted person, to the extent that the creditor is assisting such assisted person to restructure any debt owed by such assisted person to the creditor;

(D) a depository institution (as defined in section 3 of the Federal Deposit Insurance Act) or any Federal credit union or State credit union (as those terms are defined in section 101 of the Federal Credit Union Act), or any affiliate or subsidiary of such depository institution or credit union; or

(E) an author, publisher, distributor, or seller of works subject to copyright protection under title 17, when acting in such capacity." 11 U.S.C. § 101(12A).

after the definition. See note 7, supra. More importantly, "debt relief agency" is broadly defined as "any person who provides any bankruptcy assistance to an assisted person. . . . " 11 U.S.C. § 101(12A). "Bankruptcy assistance" is defined to include "providing *legal representation* with respect to a case or proceeding under" the Bankruptcy Code. *Id.* § 101(4A) (emphasis added). Thus, a debt relief agency includes any person who provides legal representation in a bankruptcy proceeding to an assisted person. As only attorneys can provide legal representation, they are necessarily included in the definition of "debt relief agency."

Furthermore, as the district court observed, the legislative history of the BAPCPA indicates that Congress intended the act to apply to attorneys as the House Report for the BAPCPA refers to attorneys multiple times. *See, e.g.* HOUSE REPORT at 5 ("A civil enforcement initiative . . . has 'consistently identified' such problems as 'debtor misconduct and abuse, misconduct by attorneys and other professionals.'"). Therefore, the district court properly granted the Government's motion to dismiss Hersh's motion for declaratory judgment on this issue.

Hersh argues that this court should apply the doctrine of constitutional avoidance to eliminate the need to determine the constitutionality of 11 U.S.C. §§ 526(a)(4) and 527(b) in this case by holding that the term "debt relief agency" does not apply to attorneys. However, Hersh's arguments do not overcome

the referenced evident congressional intent and the plain language of the statute.

First, Hersh suggests that because the definition of "debt relief agency" does not explicitly include attorneys, they are necessarily excluded from the term. However, because the definition, when read in conjunction with the definition of "bankruptcy assistance," clearly and affirmatively includes attorneys, an exclusion for attorneys should not be implied. This is especially so because the section 101(12A) definition is simply a general definition without *any* specific inclusions, but with five specific exclusions (none of which mentions or is claimed to embrace attorneys).

Next, Hersh argues that section 527(b) requires debt relief agencies to inform assisted persons that they have the right to hire an attorney or represent themselves, which would not be necessary if an attorney was a debt relief agency. However, debt relief agencies are not limited to attorneys and section 527(b) specifically indicates that this advice is only necessary "to the extent applicable." Thus, an attorney acting as a debt relief agency would not be required to provide her clients with this advice.

Third, Hersh notes that her clients include creditors and others who qualify as "assisted persons," but seek legal advice for bankruptcy-related matters unrelated to their own bankruptcy filings. She suggests that if attorneys are not omitted from the definition of debt relief agency, they must abide

by the provisions that apply to debt relief agencies even when they are not advising debtors. The definition of "assisted person" under the BAPCPA does not explicitly indicate that only those seeking to file for or inquire about entering bankruptcy qualify as assisted persons. *See* 11 U.S.C. § 101(3) (An "assisted person" is "any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than $164,250."). However, if Hersh is counseling a client who is a creditor or any other client who qualifies as an "assisted person" but who is not seeking legal advice related to the client's own bankruptcy, Hersh would not be in danger of violating section 526(a)(4) as she would not advise that client to incur more debt in contemplation of bankruptcy (precluded by section 526(a)(4)) because that client would not be filing for bankruptcy. She also would not need to provide that client with the information required by section 527(b) because that information only must be provided "to the extent applicable," and would only apply to debtors contemplating their own bankruptcy. Thus, Hersh has not shown that attorneys must abide by the BAPCPA even when they are not counseling debtors. Furthermore, she does not explain why this argument does not apply to any debt relief agency, so it does not seem to support her position that attorneys should be excluded from the definition.

Finally, Hersh suggests that because the BAPCPA regulates the conduct of debt relief agencies, if attorneys are held to be debt relief agencies, states

would be deprived of their ability to determine and enforce qualifications for legal practice, which would infringe on the states' roll in regulating attorneys. In support of this argument, she cites 11 U.S.C. § 526(d)(2)(A), which states that nothing in section 526, 527, and 528 shall "be deemed to limit or curtail the authority or ability . . . of a State or subdivision or instrumentality thereof, to determine and enforce qualifications for the practice of law under the laws of that State." Treating attorneys as debt relief agencies will not deprive states of the ability to regulate their own lawyers. It is clear that Congress can regulate the conduct of attorneys practicing in federal courts and in bankruptcy proceedings without impinging on states' rights. *See, e.g.*, Rule 11, FED. R. CIV. P., and Rule 9011, FED. R. BANKR. P.

For the reasons stated, we agree with the Eighth Circuit's unanimous opinion in *Milavetz* on this issue and we hold that the district court properly concluded that, under the plain language of the section 101(12A) definition, an attorney providing, "in return for the payment of money or other valuable consideration," "bankruptcy assistance," as defined in section 101(4A), to an "assisted person," as defined in section 101(3), is a "debt relief agency" for purposes of the BAPCPA.

II. Whether 11 U.S.C. § 526(a)(4) is Facially Unconstitutional in Violation of the First Amendment

The Government argues that the district court erred in holding that section 526(a)(4) is wholly invalid as a facially unconstitutional violation of the First Amendment.

Section 526(a)(4) provides that

"(a) A debt relief agency shall not-

. . .

> (4) advise an assisted person or prospective assisted person to incur more debt in contemplation of such person filing a case under this title or to pay an attorney or bankruptcy petition preparer fee or charge for services performed as part of preparing for or representing a debtor in a case under this title."

As above noted, the only federal appellate court to have addressed section 526(a)(4) is the Eighth Circuit in *Milavetz* where the panel majority held "that § 526(a)(4) is substantially overbroad, and unconstitutional as applied to attorneys who provide bankruptcy assistance to assisted persons, as those terms are defined in the Code." 541 F.3d at 794 (footnote omitted). The panel majority there reasoned that "§ 526(a)(4) prohibits attorneys . . . from advising any assisted person to incur any additional debt in contemplation of bankruptcy; this prohibition would include advice constituting prudent bankruptcy

planning that is not an attempt to circumvent, abuse, or undermine the bankruptcy laws," and that thus "[s]ection 526(a)(4), as written, prevents attorneys from fulfilling their duty to clients to give them appropriate and beneficial advice not otherwise prohibited. . . . " *Id.* at 793.[8] Judge Colloton dissented, on the ground that the court, under authorities such as *Boos v. Barry,* 108 S.Ct. 1157 (1988), should have adopted a narrowing construction of "in contemplation of" bankruptcy in section 526(a)(4) to mean "with the intent to abuse the protections of the bankruptcy system," and that as so construed section 526(a)(4) was not overbroad. *Milavetz,* 541 F.3d at 798-99 (Colloton, J., dissenting).

The district court here held that section 526(a)(4) unconstitutionally restricts Hersh's speech. *Hersh,* 347 B.R. at 25. In proceedings below, the parties disputed whether strict scrutiny or a more lenient standard set forth in *Gentile v. State Bar of Nevada,* 111 S.Ct. 2720, 2745 (1991) should apply in determining the statute's constitutionality. *Hersh,* 347 B.R. at

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[8] Several district courts that have addressed the constitutionality of § 526(a)(4) have also determined that the statute violates the First Amendment. *See Zelotes v. Adams,* 363 B.R. 660, 667 (D. Conn. 2007) ("Because § 526(a)(4) is not sufficiently 'narrowly tailored to achieve the desired objective,' it is unconstitutional as applied to bankruptcy attorneys."); *In re Reyes,* 361 B.R. at 279 ("This court . . . holds 11 U.S.C. §§ 526, 527, and 528 are unconstitutional as applied to attorneys."); *Olsen,* 350 B.R. at 916 (following the reasoning of *Hersh* to hold that § 526(a)(4) is unconstitutional in violation of the First Amendment).

23-24. Because the district court held that section 526(a)(4) does not survive scrutiny under the more lenient standard, it did not decide which level of scrutiny should apply. *Id.* However, in a footnote, the court held in the alternative that because section 526(a)(4) does not purport to be an ethical standard, which the district court concluded would render it subject to the more lenient *Gentile* test, strict scrutiny should apply. *Id.* at 24 n.8. It noted that the statute fails under the strict scrutiny test for the same reasons that it fails the more lenient test. *Id.*

The district court noted that section 526(a)(4) was meant to end manipulation of the bankruptcy system, but that it did not close loopholes or penalize people who take on debt before filing for bankruptcy. *Id.* at 24. It suggested that taking on additional debt "in contemplation" of bankruptcy is not necessarily abusive of the bankruptcy system. *Id.* In some cases taking on additional debt will be the most financially prudent option for the debtor, such as when a debtor "(1) refinanc[es] at a lower rate to reduce payments and forestall or even prevent entering bankruptcy, or (2) tak[es] on secured debt such as [a] loan on an automobile that would survive bankruptcy and also enable the debtor to continue to get to work and make payments." *Id.*[9] Thus, the court concluded the statute

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[9] These are essentially the same examples as those cited by the *Milavetz* majority. 541 F.3d at 793-94. The government argues that § 526(a)(4) does not reach these nonabusive situations.

is over inclusive. *Id.* at 25. Therefore, the court held that the statute is facially unconstitutional on overbreadth grounds, and, thus, completely invalidated the law. *Id.*

A. Doctrine of Constitutional Avoidance

The parties dispute whether the district court properly interpreted section 526(a)(4) to prohibit attorneys from advising clients to incur debt on the eve of bankruptcy when doing so would be legal, not abusive of the bankruptcy system, and the best option for the debtor. We hold the doctrine of constitutional avoidance should be applied to section 526(a)(4) to avoid any of the potential constitutional problems with this statute that have been raised by Hersh.

Under the doctrine of constitutional avoidance, "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council,* 108 S.Ct. 1392, 1397 (1988). *See also Zadvydas v. Davis,* 121 S.Ct. 2491, 2498 (2001) ("'[I]t is a cardinal principle' of statutory interpretation . . . that when an Act of Congress raises 'a serious doubt' as to its constitutionality, 'this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'") (quoting *Crowell v. Benson,* 52 S.Ct. 285, 296 (1932)). Constitutional

avoidance is a "cardinal principal" of constitutional law that "has for so long been applied by [the Supreme Court] that is it beyond debate." *DeBartolo*, 108 S.Ct. at 1397.

The Government argues that under the doctrine of constitutional avoidance, the portion of section 526(a)(4) that states that a debt relief agency shall not "advise an assisted person or prospective assisted person to incur more debt in contemplation of such person filing a case under this title" should be interpreted narrowly to apply only to situations in which incurring debt just before bankruptcy would be an abuse of the bankruptcy system. However, Hersh, on the other hand, argues that the plain language of the statute clearly prohibits attorneys from advising clients in any situation to incur any debt for any purpose when intending, or considering whether to, file bankruptcy, even when doing so would not be an abuse of the bankruptcy system.

If interpreted literally and broadly, section 526(a)(4) would raise serious constitutional problems because, as Hersh suggests, it would restrict some speech that is protected by the First Amendment. The statute does not expressly qualify its restriction on advice to situations in which incurring more debt would be an abuse of the bankruptcy system. Thus, if interpreted literally, section 526(a)(4) creates a blanket restriction on attorneys advising clients to incur any debt when intending, or contemplating whether to, file for bankruptcy under any circumstances. It would prohibit some attorney advice that would not

be abusive to the bankruptcy system, harmful to creditors, or harmful to debtors.[10] Thus, if interpreted literally, section 526(a)(4) may apply to speech that is protected by the First Amendment.

However, Hersh does not dispute that section 526(a)(4), even when read literally, does prohibit some speech that Congress can regulate without violating the First Amendment. The "principal purpose of the Bankruptcy Code is to grant a fresh start to the honest but unfortunate debtor." *Marrama v. Citizens Bank of Massachusetts,* 127 S.Ct. 1105, 1107 (2007) (internal citation omitted). By incurring debt before bankruptcy without intending to repay the debt, a debtor can cost creditors significant amounts

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[10] Hersh provides some examples of when her clients assertedly should be encouraged to incur new secured debt before filing for bankruptcy. First, a client may be able to obtain better secured loan terms prior to filing. It may be appropriate to incur debt such as a home equity based line of credit before filing for bankruptcy because the terms of the credit may not be available at all after a bankruptcy filing. Furthermore, it might be advisable for a client to finance a new vehicle while his credit ratings are intact before filing for bankruptcy so that he will be able to commute to work to pay off his debts. It may also be advisable for a couple planning to divorce to have one spouse accelerate efforts to secure a mortgage or lease before filing for bankruptcy if the mortgage or lease would not be available immediately after bankruptcy is filed. Finally, it might be advisable for a person to finance education through non-dischargeable educational loans before filing for bankruptcy if she could not do so after filing. The government generally takes the position that in nonabusive situations of this kind § 526(a)(4) does not preclude advice to incur the debt.

of money. A debtor may also disqualify himself from obtaining bankruptcy relief. *See id.* at 1112 (holding that a debtor cannot automatically convert his bankruptcy from Chapter 7 to Chapter 13 under section 706(a) if he acts in bad faith). Thus, Congress has an interest in preventing abuse of the bankruptcy system by both the debtors who incur debts just before filing for bankruptcy and by the people who advise them to do so. A debtor who incurs debt before bankruptcy in order to abuse the system is not one of the "honest but unfortunate" debtors that the bankruptcy system is designed to protect. *Id.* at 1107.

Furthermore, when a debtor incurs debt in contemplation of bankruptcy with no intention of repaying his debts or with the intention to otherwise manipulate the bankruptcy system, he may well be committing a fraudulent act that may violate federal law. *See* 11 U.S.C. § 523(a)(2);[11] 18 U.S.C. § 152(2) ("A person who . . . knowingly and fraudulently makes a false oath or account in or in relation to any case under title 11 . . . shall be fined under this title,

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[11] 11 U.S.C. § 523(a)(2) states:

"(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt . . .

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by –

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition".

imprisoned not more than 5 years, or both."); *Id.* at § 157.[12] *See also Attorney Grievance Comm'n of Maryland v. Culver,* 849 A.2d 423, 434 (Md. 2004) ("[b]y advising his client to obtain loans with the intention of having the debts discharged in bankruptcy, [the defendant] counseled [his client] to commit a fraudulent act," which violated the Maryland Rules of Professional Conduct). Taking out loans without intending to repay them may also be considered theft under state law. *See Henke v. State,* 730 S.W.2d 117, 118-19 (Tex. App. – Corpus Christi 1987) (affirming a grain hauler's conviction of felony theft because he took grain under a contract knowing that he would

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[12] 18 U.S.C. § 157 states:

"A person who, having devised or intending to devise a scheme or artifice to defraud and for the purpose of executing or concealing such a scheme or artifice or attempting to do so –

(1) files a petition under title 11, including a fraudulent involuntary bankruptcy petition under section 303 of such title;

(2) files a document in a proceeding under title 11, including a fraudulent involuntary bankruptcy petition under section 303 of such title; or

(3) makes a false or fraudulent representation, claim, or promise concerning or in relation to a proceeding under title 11, including a fraudulent involuntary bankruptcy petition under section 303 of such title, at any time before or after the filing of the petition, or in relation to a proceeding falsely asserted to be pending under such title,

shall be fined under this title, imprisoned not more than 5 years, or both."

not be able to pay for it). The government may regulate or ban speech in which a person proposes an illegal transaction. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 102 S.Ct. 1186, 1192 (1982).

Moreover, the Supreme Court has upheld other regulations on attorney speech that are aimed at preventing abusive behavior. In *Gentile,* the Supreme Court discussed ABA Model Rule of Professional Conduct 3.6 (1981), which prohibits attorneys from making extrajudicial statements that a reasonable person would expect to be spread through public communication if the lawyer knows or should know that making the statement was substantially likely to materially prejudice an adjudicative proceeding. 111 S.Ct. at 2725. The Court indicated that this regulation of attorney speech, as adopted by Nevada, was permissible as it can be "[i]nterpreted in a proper and narrow manner" so as to "punish only speech that creates a danger of imminent and substantial harm." *Id.* Thus, it suggested that restrictions on attorney speech are proper in certain situations. It indicated that attorneys are "subject to ethical restrictions on speech to which an ordinary citizen would not be," and that a state "may demand some adherence to the precepts of [its legal system] in regulating [attorney] speech as well as [attorney] conduct." *Id.* at 2743, 2744. The Court also held that "speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press." *Id.* at 2744.

Thus, the Supreme Court has held that attorney speech may be subject to diminished First Amendment protection when it is regulated in furtherance of a substantial governmental interest. *Id.* at 2745.

The ability of the government to regulate the speech of attorneys is also made evident by other Model Rules of Professional Conduct. For example, Rule 1.2(d) prohibits attorneys from advising clients to commit fraudulent or criminal acts.[13] This ethical rule states:

> "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good-faith effort to determine the validity, scope, meaning, or application of the law."

The parties do not cite and this court could not find any case in which this rule, as adopted by a state, has been challenged as a violation of the First

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[13] This regulation on attorney speech, like the language of *Gentile*, also reveals how Congress can regulate debt relief agencies other than attorneys. All debt relief agencies, including non-attorneys, have a similar relationship to their debtor-clients because they are all advising their clients in or concerning the bankruptcy process. Thus, the assumed constitutionality of Rule 1.2(d) demonstrates that Congress can prevent all debt relief agencies, not just attorneys who are debt relief agencies, from advising their clients to incur debt before bankruptcy when doing so would be an abuse of the bankruptcy system.

Amendment right to freedom of speech. Nor does Hersh argue that this type of regulation unconstitutionally restricts attorney speech. As incurring debt in contemplation of bankruptcy, *where* doing so constitutes an abusive practice, is akin to committing a fraudulent act, it is clear that Congress can constitutionally prevent attorneys or other debt relief agencies from advising their clients to do so.

To avoid potential constitutional questions regarding section 526(a)(4)'s restrictions on speech, this court construes the statute to prevent only a debt relief agency's advice to a debtor to incur debt in contemplation of bankruptcy when doing so would be an abuse of the bankruptcy system. In so interpreting the statute, we avoid the constitutionality questions raised by Hersh (and those relied on by the *Milavetz* majority), and conclude that the statute only affects unprotected speech.

While we recognize that the doctrine of constitutional avoidance "is not a license for the judiciary to rewrite language enacted by the legislature," *United States v. Albertini,* 105 S.Ct. 2897, 2902 (1985), it is nevertheless the fact that the Supreme Court has on several occasions applied to acts of Congress "[a] restrictive meaning for what appear to be plain words" where "such a restrictive meaning must be given if a broader meaning would generate constitutional doubts." *United States v. Witkovich,* 77 S.Ct. 779, 782 (1957). Thus, in *Witkovich* the wording of the challenged statutory section "read in isolation and literally" conferred on the Attorney General

"authority to require whatever information he deems desirable of aliens whose deportation has not been effected within six months after it has been commanded."[14] *Id.* But the Court, rejecting "the tyranny of literalness," and relying instead on the doctrine of constitutional avoidance, *id.*, held that the "appropriate construction" was "to limit the statute to authorizing all questions reasonably calculated to keep the Attorney General advised regarding the continued availability for departure of aliens whose deportation is overdue." *Id.* at 784.

In *Zadvydas*, the Court addressed a statute authorizing the Attorney General, after the ninety day removal period, to detain *without any stated durational limitation*, certain aliens subject to final orders of deportation pending effectuation of their deportation. 121 S.Ct. at 2494-95.[15] The Court held that the statute must be construed, "in light of the Constitution's demands" to be limited to detention for a reasonable time, *id.* at 2498, which the Court

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[14] The statutory section there in question (former 8 U.S.C. § 1252(d)(3)) provided that the Attorney General could require aliens who had been under a deportation order for more than six months but had not been actually deported "(3) to give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper." *Witkovich*, 77 S.Ct. at 780.

[15] The "removal period" referred to the statutory 90 day period, beginning when the deportation order became final, within which the Attorney General is required to detain the alien and affectuate his removal. *Zadvydas*, 121 S.Ct. at 2494.

decreed to be presumptively six months (a period nowhere mentioned in the statute) after the ninety day removal period but which could extend past the six months "until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future." *Id.* at 2505. In this connection, *Zadvydas* expressly relied on *Witkovich,* stating:

> "We have read significant limitations into other immigration statutes in order to avoid their constitutional invalidation. See *United States v. Witkovich,* 353 U.S. 194, 195, 202, 77 S.Ct. 779, 1 L.Ed.2d 765 (1957) (construing a grant of authority to the Attorney General to ask aliens whatever questions he 'deem[s] fit and proper' as limited to questions 'reasonably calculated to keep the Attorney General advised regarding the continued availability for departure of aliens whose deportation is overdue'). For similar reasons, we read an implicit limitation into the statute before us." 121 S.Ct. at 2498.

Another example of the Court's adoption of a limiting construction of a facially unrestricted statutory provision, to avoid a serious constitutional problem, is afforded by *Boos v. Barry,* 108 S.Ct. 1157 (1988). There the court faced, *inter alia,* a First Amendment challenge to the federal statute, applicable to "any building or premises within the District of Columbia used or occupied by any foreign government . . . as an embassy, legation, consulate, or for other official purposes," which provided that "[i]t shall be unlawful" (among other things): "to

congregate within 500 feet of any such building or premises, and refuse to disperse after having been ordered so to do by the police authorities of said District." *Id.* at 1161.

The Court stated:

> "Standing alone, this text is problematic both because it applies to *any* congregation within 500 feet of an embassy for *any* reason and because it appears to place no limits at all on the dispersal authority of the police. The Court of Appeals, however, has provided a narrowing construction that alleviates both of these difficulties.
>
> . . .
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> [T]he Court of Appeals . . . concluded that the statute permits the dispersal only of congregations that are directed at an embassy; it does not grant 'police the power to disperse for reasons having nothing to do with the nearby embassy.' . . . [T]he Court of Appeals further circumscribed police discretion by holding that the statute permits dispersal 'only when the police reasonably believe that a threat to the security or peace of the embassy is present.'" *Id.* at 1168.

The Court proceeded to reject the "protest that the Court of Appeals was without authority to narrow the statute," stating:

> "It is well settled that federal courts have the power to adopt narrowing constructions of federal legislation. . . . Indeed the federal

> courts have the duty to avoid constitutional difficulties by doing so if such a construction is fairly possible. . . . [W]e see no barrier to the Court of Appeals' adoption of a narrowing construction." *Id.* at 1169.[16]

The Court then held that "[s]o narrowed, the congregation clause withstands First Amendment overbreadth scrutiny. It does not reach a substantial amount of constitutionally protected conduct. . . . " *Id.* Thus, the *Boos* Court approved a *limiting* construction of the statute – *adding* a requirement, *nowhere* expressed in the statute, of reasonable belief of a present threat to the security or peace of a targeted embassy – to save the statute from being invalidated on First Amendment overbreadth grounds.

Many factors demonstrate that section 526(a)(4) can and should be interpreted in an analogous way.

First, the fact that section 526(a)(4) utilizes the phrase "in contemplation of" bankruptcy suggests that the statute is directed at situations in which a debtor intends to abuse the bankruptcy system. The phrase "contemplation of bankruptcy" has been defined as: "The thought of declaring bankruptcy because of the inability to continue current financial operations, often coupled with action designed to

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[16] The Court likewise rejected the notion that a narrowing construction of this statute could not properly be adopted "unless such a construction is reasonable and readily apparent." *Boos*, 108 S.Ct. at 1168-69.

thwart the distribution of assets in a bankruptcy proceeding." BLACK'S LAW DICTIONARY 336 (8th ed. 2004). The fact that the thought of bankruptcy under this definition is "often coupled with" an intent to abuse the system suggests that when enacting this statute Congress's focus was on instances of bankruptcy abuse to be prohibited. Furthermore, courts have employed the "in contemplation" phrase in a manner suggestive of an intent to defraud the bankruptcy system. *See, e.g., In re Mercer,* 246 F.3d 391, 421 n.43 (5th Cir. 2001) (en banc) (describing "loading up" on debt, a practice which is abusive of the bankruptcy system, as the practice of "incurring card debt in contemplation of bankruptcy"); *In re Charles,* 334 B.R. 207, 222 (Bankr. S.D. Tex. 2005) ("It is settled law that a debtor's good faith should be questioned if the debtor makes purchases in contemplation of a bankruptcy case."). Other opinions reflecting a similar understanding of "in contemplation of" bankruptcy are discussed in Judge Colloton's dissenting opinion in *Milavetz,* 541 F.3d at 799-800.[17]

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[17] See the following from Judge Colloton's dissenting opinion:

> "American and English authorities construing the bankruptcy laws also support the proposition that the words 'in contemplation of' may be understood to require an intent to abuse the bankruptcy laws. *In re Pearce,* 21 Vt. 611, 19 F. Cas. 50, 53 (D.Vt. 1843) (No. 10873) (concluding that an act was done 'in contemplation of bankruptcy' if it was done 'in anticipation of breaking or failing in his business, of committing an act of bankruptcy, or of being declared bankrupt at his

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The remedies for violations of section 526(a)(4), which are only civil, also reflect that the focus of that section is to preclude attorneys from advising clients to incur debt in order to abuse the bankruptcy system. The primary remedy for a violation of section 526(a)(4) is a civil action by the debtor or state attorney general to recover actual damages for the debtor. 11 U.S.C. § 526(c)(2)-(3). Actual damages, as well as restitution for any fees paid the violator by the debtor, and attorneys' fees can be recovered by a debtor when a debt relief agency intentionally or negligently fails to comply with section 526, 527, or 528. *Id.* § 526(c)(2)(A). Furthermore, if the state has reason to believe that a debt relief agency has violated section 526, it may bring an action to enjoin the violation, bring an action on behalf of its residents to

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own instance, on the ground of inability to pay his debts, *and intending to defeat the general distribution of effects, which takes place under a proceeding in bankruptcy.*') (emphasis added); *Morgan v. Brundrett,* 5 Barn. & Ad. 289, 296, 110 Eng. Rep. 798, 801 (K.B. 1833) (Parke, J.) (interpreting 'in contemplation of bankruptcy' to mean that 'the payment or delivery must be with intent to defeat the general distribution of effects which takes place under a commission of bankruptcy.'); *Fidgeon v. Sharpe,* 5 Taunt. 539, 545-46, 128 Eng. Rep. 800, 802-03 (C.P. 1814) (Gibbs, C.J.) (An act made in contemplation of bankruptcy 'must be intended in fraud of the bankrupt laws.'); *cf. Buckingham v. McLean,* 54 U.S. 151, 167, 13 How. 151, 14 L.Ed. 91 (1851) . . . *id.* at 169 (relying on English bankruptcy decisions as instructive authority on meaning of the former Bankrupt Act)." *Milavetz,* 541 F.3d at 799-800.

recover actual damages for debtors arising out of the violation, and can recover costs and attorneys' fees from the debt relief agency if it is successful. *Id.* § 526(c)(3)(A)-(C).[18] Under section 526(c)(5), a

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[18] 11 U.S.C. § 526(c)(2)-(3) provides:

"(2) Any debt relief agency shall be liable to an assisted person in the amount of any fees or charges in connection with providing bankruptcy assistance to such person that such debt relief agency has received, for actual damages, and for reasonable attorneys' fees and costs if such agency is found, after notice and a hearing, to have –

(A) intentionally or negligently failed to comply with any provision of this section, section 527, or section 528 with respect to a case or proceeding under this title for such assisted person;

(B) provided bankruptcy assistance to an assisted person in a case or proceeding under this title that is dismissed or converted to a case under another chapter of this title because of such agency's intentional or negligent failure to file any required document including those specified in section 521; or

(C) intentionally or negligently disregarded the material requirements of this title or the Federal Rules of Bankruptcy Procedure applicable to such agency.

(3) In addition to such other remedies as are provided under State law, whenever the chief law enforcement officer of a State, or an official or agency designated by a State, has reason to believe that any person has violated or is violating this section, the State –

(A) may bring an action to enjoin such violation;

(B) may bring an action on behalf of its residents to recover the actual damages of assisted persons arising from such violation, including any liability under paragraph (2); and

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bankruptcy court may impose an appropriate civil penalty or enjoin a violation if it finds intentional violations of the provisions or a clear and consistent practice of violations. *Id.* § 526(c)(5). Congress's emphasis on actual damages for violations of section 526(a)(4) strongly suggests that Congress viewed that section as aimed at advice to debtors which if followed would have a significant risk of harming the debtor. This suggests that Congress only intended to prevent debt relief agencies from advising clients to incur debt before bankruptcy when doing so would be abusive, and thus have significant potential negative repercussions for the debtor such as dismissal of a petition or denial of discharge.

In enacting the BAPCPA, Congress was attempting to address common abuses of the bankruptcy system. Congress concluded that there was a pervasive abuse of the bankruptcy system by debtors who incur debt before bankruptcy with the intention of having their debt discharged. *See* HOUSE REPORT at 15 (referring to the "abusive practices by consumer debtors who . . . knowingly load up with credit card purchases or recklessly obtain cash advances and then file for bankruptcy relief"). This Congressional intent is made evident by the changes that the BAPCPA made to section 523(a)(2)(C)(i)(I) to make the

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(C) in the case of any successful action under subparagraph (A) or (B), shall be awarded the costs of the action and reasonable attorneys' fees as determined by the court."

rules regarding debt for eve-of-bankruptcy spending more stringent. This provision made a debt incurred for "luxury goods" non-dischargeable if over $550 and incurred within ninety days of filing for bankruptcy as opposed to the previous rule, which made a debt for "luxury goods" non-dischargeable if over $1,225 of debt was incurred within sixty days of bankruptcy. 11 U.S.C.A. § 523, Historical and Statutory Notes. It appears that Congress enacted section 526(a)(4) as a means of combating such abuse.

In enacting the BAPCPA, Congress also expanded the bankruptcy courts' authority to dismiss petitions for abuse of the bankruptcy system, which likewise reflects congressional intent to curb bankruptcy abuse through the new act. Under the former version of section 11 U.S.C. § 707(b)(1), a bankruptcy court could dismiss a petition for "substantial abuse," such as when a debtor accumulated debt in contemplation of bankruptcy with the intention of having the debt discharged. Now a bankruptcy petition may be dismissed for mere "abuse" instead of "substantial abuse," and the statutory assumption in favor of granting the relief sought by the debtor has been repealed. 11 U.S.C. § 707(b)(1).[19] Moreover, under new

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[19] Bad faith pre-petition conduct by a debtor justifies dismissal of a bankruptcy proceeding under other chapters of the bankruptcy code as well. *See, e.g., Marrama*, 127 S.Ct. at 1107, 1111-12 (indicating that "despite the absence of any statutory provision specifically addressing the issue, the federal courts are virtually unanimous that prepetition bad-faith conduct may cause a forfeiture of any right to proceed with a

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section 707(b)(4)(C) an attorney's signature on a petition, pleading or motion certifies that after reasonable investigation the attorney has determined that it "does not constitute an abuse under paragraph (1)." This demonstrates that Congress intended to curb abuse with the new provisions of the BAPCPA, and suggests that as part of this plan, section 526(a)(4) is only meant to curb abusive practices.

In the BAPCPA, Congress also introduced "means testing" to restrict debtors who can repay at least a portion of their debts from obtaining complete discharge under Chapter 7. *See* HOUSE REPORT at 2 ("The heart of the [BAPCPA's] consumer bankruptcy reforms consists of the implementation of an income/expense screening mechanism ('needs-based bankruptcy relief' or 'means testing'), which is intended to ensure that debtors repay creditors the maximum they can afford."). Under this provision, the debtor's petition for relief under Chapter 7 is presumed to be abusive if the debtor's income exceeds the unsecured debts by a specified ratio.[20] 11 U.S.C.

Chapter 13 case," and holding that 11 U.S.C. § 706(a), which allows (without relevant express restriction) conversion of a bankruptcy from a Chapter 7 case to a Chapter 13 case, does not allow such a conversion in cases in which a debtor has acted in "bad faith").

[20] One treatise explains the means test as follows:

> "The debtor must average net income from the six months prior to a bankruptcy filing (net of allowable expenses), and multiply that monthly average by 60. If the debtor is able to pay at least 25% of his or her

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§ 707(b)(2)(A). Thus, a debtor who is able to repay a certain amount of his debts must file under Chapter 13 or 11, both of which allow for a structured repayment plan, or have his case dismissed. However, such means testing gives debtors an incentive to load up on debt because a higher debt ratio can allow a debtor to avoid a Chapter 13 repayment plan and obtain discharge under Chapter 7 by manipulating the formula under which bankruptcy abuse is presumed. This incentive structure likely raised concern that attorneys and others would advise clients to take on more debt before filing for bankruptcy in order to have their debts discharged and to avoid a Chapter 13 repayment plan. This also suggests that Congress intended section 526(a)(4)'s restriction on advice to incur "more debt in contemplation of" bankruptcy to prevent that sort of abuse of the bankruptcy system.

The placement of section 526(a)(4) among three provisions meant to curb abuse of the bankruptcy system by debt relief agencies likewise suggests that the statute was only intended to curb abuse. Section 526(a) contains three other rules of professional conduct designed to protect debtors from abusive practices of debt relief agencies. Section 526(a)(1)

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consumer debt, with income not necessary for the maintenance of the debtor and allowed dependants, then the debtor will be directed to switch out of Chapter 7 to a Chapter 13 repayment plan." WILLIAM L. NORTON, JR., NORTON BANKRUPTCY LAW AND PRACTICE § 26:8 (3d ed. 2008).

requires debt relief agencies to perform all services promised, section 526(a)(2) prohibits them from advising an assisted person to make untrue or misleading statements when seeking bankruptcy relief, and section (a)(3) precludes debt relief agencies from misrepresenting the services they will provide or the costs or benefits of filing for bankruptcy relief. This suggests that Congress did not enact 526(a)(4) as a sweeping prohibition on good faith, lawful, and ethical advice.

For the reasons stated above, we hold that under the doctrine of constitutional avoidance, the language of section 526(a)(4) can and should be interpreted only to prohibit attorneys from advising clients to incur debt in contemplation of bankruptcy when doing so would be an abuse or improper manipulation of the bankruptcy system. Thus, section 526(a)(4) has no application to good faith advice to engage in conduct that is consistent with a debtor's interest and does not abuse or improperly manipulate the bankruptcy system.

B. Overbreadth

Hersh argues that the district court correctly concluded that section 526(a)(4) is facially unconstitutional.[21] The Government challenges this holding.

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[21] In her Second Amended Complaint for Declaratory Judgment and Permanent Injunctive Relief, Hersh contended that § 526(a)(4) "violates the First Amendment, on its face and

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Hersh does not suggest that the statute is invalid "as applied" to her or that if this court does not hold section 526(a)(4) facially invalid, it should invalidate the statute on more narrow grounds.[22] Thus, we will only address whether the district court correctly concluded that section 526(a)(4) is unconstitutional on its face.

A court can hold a statute to be facially unconstitutional, as opposed to unconstitutional "as applied," if it is excessively vague or substantially overbroad. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 1142 (7th ed. 2004). The district court held section 526(a)(4) facially unconstitutional on overbreadth grounds. *Hersh*, 347 B.R. at 25.[23] According to our First Amendment overbreadth

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as applied, because it prohibits, under threat of civil penalty, Constitutionally protected speech." However, she argued in her motion for summary judgment and in her briefs only that the statute is facially unconstitutional.

[22] It is questionable whether Hersh would have standing to bring an as-applied challenge to § 526(a)(4) as the statute has not been enforced against her and there is no evidence or allegation that anyone has threatened to enforce it against her for giving her clients advice in violation of the statute (or for any other reason). However, as she clearly does not make an as-applied argument in her brief and the district court held the statute facially invalid, we need not determine whether she has demonstrated standing for an as applied challenge.

[23] There are two tests for determining whether a statute is facially unconstitutional on overbreadth grounds. *Washington State Grange v. Washington State Republican Party*, 128 S.Ct. 1184, 1190 (2008). In cases that do not involve First Amendment claims, a statute is overbroad if it is "unconstitutional in all of

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doctrine, a statute is facially invalid if it prohibits a substantial amount of protected speech." *United States v. Williams,* 128 S.Ct. 1830, 1838 (2008). Such facial challenges can succeed only when this overbreadth is substantial in relation to the statute's legitimate reach. *Id.* There must be a "significant imbalance between the protected speech the statute should not punish and the unprotected speech it legitimately reaches." *Shackelford v. Shirley,* 948 F.2d 935, 940 (5th Cir. 1991). The party challenging the statute must demonstrate "'a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the [c]ourt' before a statute will be struck down as facially overbroad." *Id.* (alterations in original) (quoting *City Council of Los Angeles v. Taxpayers for Vincent,* 104 S.Ct. 2118, 2126-27 (1984)).

The fact that a court can hypothesize situations in which the statute will impact protected speech is not alone sufficient. *Taxpayers for Vincent,* 104 S.Ct. at 2126; *Shackelford,* 948 F.2d at 940. Facial challenges to the constitutionality of statutes should be granted "sparingly, and only as a last resort," so

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its applications." *Id.* (citing *United States v. Salerno,* 107 S.Ct. 2095, 2100 (1987)). However, in the First Amendment context, there is a second type of facial challenge in which a law may be impermissibly overbroad if "a substantial number of its applications are unconstitutional judged in relation to the statute's plainly legitimate sweep." *Id.* at 1190 n.6 (internal quotations omitted).

as-applied challenges are preferred. *Broadrick v. Oklahoma,* 93 S.Ct. 2908, 2916 (1973). Facial challenges "often rest on speculation" because they do not involve specific applications of a statute, but rather hypothetical applications. *Washington State Grange,* 128 S.Ct. at 1191. They also "threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Id.* Invalidating a law that is perfectly constitutional in some applications has "obvious harmful effects." *Williams,* 128 S.Ct. at 1838.

"The first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *Williams,* 128 S.Ct. at 1838. Although, as described above, Hersh and the district court noted several examples in which advice to a client to incur debt in contemplation of bankruptcy should be protected by the First Amendment, as described above, this court has construed the statute so that it does not apply to these situations. As so construed, the statute does not restrict the speech that Hersh argues is protected by the First Amendment. Thus, there is no significant imbalance between any protected speech the statute restricts and the speech that the statute legitimately restricts.

Moreover, as the Government notes, the district court did not address, and Hersh did not discuss in her motion for summary judgment, the final portion of section 526(a)(4), which prohibits debt relief agencies from advising clients to incur debt in order to pay their fees.[24] In her brief in this court, Hersh states that this prohibition also violates the First Amendment and separation of powers principles. Hersh argues that it creates an unconstitutional restriction on speech because it inhibits advice to hire a lawyer, and "if incurring [debt to pay fees for services] is the only way that a person of few means in financial distress may obtain a lawyer, Congress may not prevent an attorney from advising a client to do it."

However, Hersh raised her arguments regarding this provision of section 526(a)(4) only on appeal. This court generally does not address an argument raised for the first time on appeal. *See, e.g., Leverette v. Louisville Ladder Co.*, 183 F.3d 339, 342 (5th Cir. 1999). Furthermore, Hersh does not argue – and has never alleged – that she plans to violate (or has ever violated) this provision by advising her clients to incur debt to pay her fees (nor does anything in the record so suggest). Moreover, Hersh does not cite authority for the proposition that preventing a debt

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[24] This part of § 526(a)(4) states: "A debt relief agency shall not . . . advise an assisted person or prospective assisted person to incur more debt . . . to pay an attorney or bankruptcy petition preparer fee or charge for services performed as part of preparing for or representing a debtor in a case under this title."

relief agency from abusing its position by seeking preferential treatment in the bankruptcy process violates the constitution. Even if Hersh's arguments are correct, and the attorneys' fees provision of section 526(a)(4) would unconstitutionally restrict some speech, there is no indication and she does not argue, that this restriction would be substantial in comparison to the legitimate reach of the statute.[25]

Under this court's construction of section 526(a)(4), it is clear that the potential for the statute to prohibit protected speech is not by any means *substantial* in relation to the statute's legitimate reach. Therefore, we hold that the district court erred in holding section 526(a)(4) unconstitutional on its face and we reverse the judgment of the district court on this issue.[26] We also reverse and dissolve the injunction imposed by the district court preventing the enforcement of this statute.

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[25] Accordingly, we do not address Hersh's contentions on appeal concerning the attorney fees clause in § 526(a)(4).

[26] Any remaining challenge to specific applications of § 526(a)(4) would be more appropriately addressed in an as-applied challenge. *See Washington State Grange*, 128 S.Ct. at 1195.

III. Whether 11 U.S.C. § 527(b) violates the First Amendment[27]

Hersh also argues that the district court erred in holding that 11 U.S.C. § 527(b)[28] does not violate the First Amendment.[29] Section 527(b) requires attorneys to provide "assisted persons" with written notice of

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[27] Hersh states in her brief that § 527 impermissibly impinges her Fifth Amendment right to act as counsel in a civil matter. The district court dismissed Hersh's Fifth Amendment claim because Hersh lacked standing to assert her clients' right to counsel and because the Fifth Amendment does not give her the right to provide counsel to her clients. *Hersh*, 347 B.R. at 28. Hersh makes no argument in the text of her brief supporting her Fifth Amendment claim, and never asserts that she has a right to provide counsel to her clients under the Fifth Amendment. Thus, the argument was not sufficiently briefed, and we will consider it waived and do not address it. *See Procter & Gamble Co. v. Amway Corp.*, 376 F.3d 496, 499 n.1 (5th Cir. 2004) ("Failure adequately to brief an issue on appeal constitutes waiver of that argument.").

[28] Although in her complaint, Hersh suggests § 527 is unconstitutional in its entirety, in her brief here, she only discusses § 527(b), not the entire § 527. Thus, any arguments that Hersh could make regarding the other subsections of § 527 have been waived, and we will only address her argument regarding the constitutionality of § 527(b) at this time. *See Procter & Gamble Co.*, 376 F.3d at 499 n.1.

[29] In her original complaint, Hersh indicated that she is challenging § 527 on its face and as applied. She repeated this claim in her First Amended Complaint for Declaratory Judgment, Temporary and Permanent Injunctive Relief. However, it is immaterial whether Hersh challenges this statute on its face or as it applies to her because we conclude that it does not violate Hersh's First Amendment rights for any of the reasons that she proposes.

certain basic information regarding bankruptcy proceedings. It states:

> "A debt relief agency providing bankruptcy assistance to an assisted person shall provide each assisted person at the same time as the notices required under subsection (a)(1) the following statement, to the extent applicable, or one substantially similar. The statement shall be clear and conspicuous and shall be in a single document separate from other documents or notices provided to the assisted person." 11 U.S.C. § 527(b).

The statement set forth in the statute provides basic factual information regarding bankruptcy proceedings.[30] The statement that a debt relief agency

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[30] As it appears in § 527(b), this statement is as follows:

"'IMPORTANT INFORMATION ABOUT BANKRUPTCY ASSISTANCE SERVICES FROM AN ATTORNEY OR BANKRUPTCY PETITION PREPARER.

'If you decide to seek bankruptcy relief, you can represent yourself, you can hire an attorney to represent you, or you can get help in some localities from a bankruptcy petition preparer who is not an attorney. THE LAW REQUIRES AN ATTORNEY OR BANKRUPTCY PETITION PREPARER TO GIVE YOU A WRITTEN CONTRACT SPECIFYING WHAT THE ATTORNEY OR BANKRUPTCY PETITION PREPARER WILL DO FOR YOU AND HOW MUCH IT WILL COST. Ask to see the contract before you hire anyone.

'The following information helps you understand what must be done in a routine bankruptcy case to help you evaluate how much service you need. Although bankruptcy can be complex, many cases are routine.

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provides to its client need not be identical to the one provided in the statute as long as it is "substantially similar." *Id.* Furthermore, section 527(b) states that a

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'Before filing a bankruptcy case, either you or your attorney should analyze your eligibility for different forms of debt relief available under the Bankruptcy Code and which form of relief is most likely to be beneficial for you. Be sure you understand the relief you can obtain and its limitations. To file a bankruptcy case, documents called a Petition, Schedules and Statement of Financial Affairs, as well as in some cases a Statement of Intention need to be prepared correctly and filed with the bankruptcy court. You will have to pay a filing fee to the bankruptcy court. Once your case starts, you will have to attend the required first meeting of creditors where you may be questioned by a court official called a 'trustee' and by creditors.

'If you choose to file a chapter 7 case, you may be asked by a creditor to reaffirm a debt. You may want help deciding whether to do so. A creditor is not permitted to coerce you into reaffirming your debts.

'If you choose to file a chapter 13 case in which you repay your creditors what you can afford over 3 to 5 years, you may also want help with preparing your chapter 13 plan and with the confirmation hearing on your plan which will be before a bankruptcy judge.

'If you select another type of relief under the Bankruptcy Code other than chapter 7 or chapter 13, you will want to find out what should be done from someone familiar with that type of relief.

'Your bankruptcy case may also involve litigation. You are generally permitted to represent yourself in litigation in bankruptcy court, but only attorneys, not bankruptcy petition preparers, can give you legal advice.'"

debt relief agency only needs to provide the information "to the extent applicable." *Id.* The statement should be provided to the debtor within three days of the commencement of representation. *Id.*

The district court held that section 527 does not violate the First Amendment because it "advances a sufficiently compelling government interest and does not unduly burden either the attorney-client relationship or the ability of a client to seek bankruptcy." *Hersh,* 347 B.R. at 27.[31] The court concluded that "[t]he factual, viewpoint-neutral statement [required by the statute] provides a sufficiently benign and narrow means of ensuring that clients are aware of certain general information regarding bankruptcy." *Id.* Thus, it granted the Government's motion to dismiss Hersh's claim that section 527(b) violates the First Amendment. *Id.* This court reviews a district court's disposition of a 12(b)(6) motion to dismiss *de novo. Equal Access for El Paso, Inc. v. Hawkins,* 509 F.3d 697 at 701-02 (5th Cir. 2007).

Hersh argues that the district court erred in holding that section 527(b) is constitutional because the disclosures required by the statute are false,

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[31] Other courts have addressed this issue as well. While some have held § 527(b) unconstitutional, others have found the statute to be a permissible compulsion of speech. *See, e.g., In re Reyes,* 361 B.R. at 279 (holding § 527 unconstitutional as it applies to attorneys); *Olsen,* 350 B.R. at 917 (following the reasoning of the district court in *Hersh* to hold that § 527 does not unconstitutionally compel speech).

misleading, and not narrowly drawn to further a compelling government interest.

The First Amendment protects compelled speech as well as compelled silence. Thus, it protects an attorney's right not to provide her client with certain factual information. *Riley v. Nat'l Fed'n of the Blind of North Carolina,* 108 S.Ct. 2667, 2677-78 (1988) (stating that in the context of protected speech, the difference between compelled speech and compelled silence is "without constitutional significance," and that compelled statements of fact as well as compelled statements of opinion burden protected speech). However, the Supreme Court has acknowledged that the government may, under certain circumstances, restrict or compel the speech of professionals. *See, e.g., Zauderer v. Office of the Disciplinary Counsel of the Supreme Court of Ohio,* 105 S.Ct. 2265, 2282 (1985) (recognizing that "unjustified or unduly burdensome disclosure requirements might offend the First Amendment," but holding that an attorney-advertiser's rights are adequately protected under a state statute requiring certain disclosures in advertisements "as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers").

The Supreme Court addressed a compelled speech case in *Riley,* 108 S.Ct. 2667. There, the Court applied strict scrutiny to invalidate a North Carolina law that required professional fundraisers to disclose to solicited potential donors the percentage of charitable contributions that the fundraiser collected

during the past year that were actually given to the charities represented. *Id.* at 2672, 2677-78. Strict scrutiny was held appropriate because the Court determined that the statute implemented a content-based regulation on speech. *Id.* at 2677. The *Riley* Court held that the state's interest in "informing [charitable] donors how the money they contribute is spent" was "not as weighty as the State assert[ed]." *Riley,* 108 S.Ct. at 2678. It also held that the requirement was "unduly burdensome and not narrowly tailored," *id.,* and would hamper charitable fundraising and "necessarily discriminates against small and unpopular charities." *Id.* at 2679. It listed multiple "more benign and narrowly tailored" options that were available. *Id.* Thus, the Court held that the statute was unconstitutional in violation of the First Amendment. *Id.* at 2680.

In *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 112 S.Ct. 2791, 2826 (1992), a plurality of the Supreme Court upheld a Pennsylvania law requiring doctors to provide women seeking abortions with certain information about the procedure, the health risks, conditions surrounding the pregnancy, and availability of state-provided information. The Court determined that the state had a "legitimate goal" of protecting the life of an unborn child and making sure that women make "mature and informed" decisions regarding abortions. *Id.* at 2824. It further reasoned that the requirement that the doctors provide the women seeking abortions with certain information was not a "substantial obstacle"

to obtaining an abortion, and therefore, not an "undue burden" on the woman. *Id.*

The district court properly concluded that the government's interest sought to be furthered by section 527(b) was "substantially compelling" for First Amendment purposes. The government's interest to be furthered by section 527(b) is in ensuring that debtors who are contemplating filing for bankruptcy have some basic knowledge about the process. The amount of debt discharged in bankruptcy is immense, so the government has a compelling interest in ensuring that those who enter bankruptcy know what it entails. HOUSE REPORT at 4 (indicating that in 1997, it was estimated that more than $44 billion of debt was discharged by debtors who filed for bankruptcy). Furthermore, section 527(b) requires debt relief agencies to provide information to "assisted persons," who are consumer debtors with a limited amount of non-exempt property. 11 U.S.C. § 101(3). Congress could have determined that these consumer debtors often lack basic knowledge about the bankruptcy system in comparison both to creditors and to their advisors (who are advising them "in return for the payment of money or other valuable consideration"), which puts the debtors at a disadvantage. The government has an interest in having the bankruptcy system explained in "plain English" to such debtors contemplating filing for bankruptcy.

The district court also correctly concluded that section 527(b) is narrowly tailored to promote this government interest, and creates a reasonable burden

on attorneys and other debt relief agencies. The statute merely sets forth a list of information about bankruptcy proceedings that a debt relief agency-acting in return for the payment of money or other valuable consideration-must provide to its clients who are "assisted persons." It does not limit the amount of information that the debt relief agency can provide, so the debt relief agency is free to expand upon, clarify, or even express disagreement with any of the provisions in the required statement. Furthermore, because section 527(b) provides that the statement should be given to the client "to the extent applicable," if the debt relief agency feels that some of the provisions of the statement are not relevant to its client, it can omit the irrelevant information. This language also provides great leeway for debt relief agencies deciding whether it is necessary to provide a client with the statement at all. If, for example, Hersh represents a creditor who qualifies as an "assisted person," section 527(b) only requires her to present the creditor with the statement if it is "applicable" to that client. Furthermore, although it may be a burden for a debt relief agency to determine whether a prospective client is an "assisted person" in three days, it would not be unduly burdensome to simply provide the person with the section 527(b) statement, and explain that it may not be necessary. Section 527(b) is narrowly tailored to Congress's interest in educating debtors about the bankruptcy system because it does not inhibit clients from obtaining relief, nor does it significantly interfere with the relationship between the debt relief agency and its

client. As a debt relief agency, Hersh can provide her clients with all of the information she desires, she simply must *also* provide them the basic information required by section 527(b), but only when and to the extent that information is relevant to the client's situation (and she is free to add any appropriate explanation desired).

Furthermore, contrary to Hersh's arguments, section 527(b) does not require Hersh or other debt relief agencies to make false and misleading statements. Most of the statements that Hersh cites as examples of false and misleading material are simply generalizations that she is free to expand upon and clarify for her clients. For example, Hersh complains that the assertion in the statute that her client "will have to pay a filing fee to the bankruptcy court" is misleading because the fee can be deferred under Federal Rule of Bankruptcy Procedure 1006(b). Hersh is completely free to explain to her client the deferral options. She can clarify for her client other provisions in the section 527(b) statement that she claims are false and misleading, or even express disagreement with them. For example, she can explain to her client that the bankruptcy trustee is not literally a "court official," and that Chapter 13 cases do not have a three year minimum requirement for certain repayment plans as the statement suggests. Furthermore, contrary to Hersh's arguments, the fact that the section 527(b) statement does not mention that only attorneys can give advice regarding whether to reaffirm debts and prepare a Chapter 13 plan, and

that only attorneys can help with confirmation hearings, does not mean that she is required to provide her clients with "false and misleading" information. Again, she is free to explain every detail of the bankruptcy process as it applies to her client. She may even alter the language of the statement to fit her preferences as long as the content remains "substantially similar."

We note that the Court in *Milavetz* unanimously upheld 11 U.S.C. §§ 528(a)(4) and 528(b)(2), rejecting challenges thereto which are essentially parallel to those raised by Hersh as to section 527(b). *See Milavetz,* 541 F.3d at 794-97. This reasoning in *Milavetz* supports our holding as to section 527(b).

For the reasons stated above, we hold that the district court properly concluded that section 527(b) does not violate Hersh's First Amendment rights because it does not unduly burden her or her clients, and is narrowly tailored to promote the government's compelling interest in ensuring that consumer debtors are aware of basic bankruptcy information.

CONCLUSION

The judgment of the district court is AFFIRMED insofar as it holds that an attorney providing, in return for the payment of money or other valuable consideration, "bankruptcy assistance" as defined in section 101(4A) of the Code, to "an assisted person" as defined in section 101(3) of the Code, is a "debt relief

agency" as defined in section 101(12A) of the Code, for purposes of the BAPCPA, and is,

AFFIRMED and insofar as it holds that section 527(b) of the Code is not invalid as violative of the First Amendment, and is,

REVERSED insofar as it holds that section 526(a)(4) of the Code is facially unconstitutional in violation of the First Amendment, and is REVERSED insofar as it enjoins the enforcement of section 526(a)(4), and,

Judgment is here rendered dissolving the injunction issued by the district court and,

Judgment is further here rendered that Hersh take nothing by her suit.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-10226

D.C. Docket No. 3:05-CV-2330

SUSAN B HERSH

Plaintiff-Appellee-Cross-Appellant

v.

UNITED STATES OF AMERICA, by and through Michael Mukasey in his capacity as Attorney General of the United States

Defendant-Appellant-Cross-Appellee

Appeals from the United States District Court for the Northern District of Texas, Dallas.

Before GARWOOD, CLEMENT, and ELROD, Circuit Judges.

JUDGMENT

(Filed Dec. 18, 2008)

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed in part and reversed in part in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that plaintiff-appellee-cross-appellant pay to defendant-appellant-cross-appellee the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE:

A True Copy
Attest

By: /s/ _____
Deputy
New Orleans, Louisiana

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SUSAN B. HERSH, Plaintiff,	§	
v.	§	Civil Action No.
UNITED STATES OF AMERICA, *et al.*,	§	3:05-CV-2330-N
Defendants.	§	

FINAL JUDGMENT

(Filed Dec. 15, 2006)

By Order dated July 26, 2006, the Court granted Defendant United States' motion to dismiss all of Plaintiff Hersh's claims, except the claim relating to 11 U.S.C. § 526(a)(4). By separate Order of this same date, the Court has granted Hersh's motion for summary judgment and denied the government's motion for summary judgment and reconsideration regarding 11 U.S.C. § 526(a)(4).

It is, therefore, ordered that Hersh have declaratory judgment that 11 U.S.C. § 526(a)(4) violates the First Amendment of the Constitution of the United States. It is further ordered that Defendant United States, its agents, and all people acting in active concert with it are permanently enjoined from enforcement of 11 U.S.C. § 526(a)(4).

The Court finds that there is no just reason for delay, and pursuant to Rule 54(b) of the Federal Rules of Civil Procedure directs entry of final judgment on Plaintiff Hersh's claims against Defendant United States. The Court gives notice pursuant to Rule 4(m) of the Federal Rules of Civil Procedure that unless Plaintiff Hersh shows good cause within thirty (30) days of the date of this Order for her failure to effect service on Defendant State of Texas, the Court will dismiss her claims against that defendant without prejudice.

Costs of court are taxed against Defendant United States and in favor of Plaintiff Hersh to the extent permitted by law. All relief not expressly granted on Plaintiff Hersh's claims against the United States is denied. This is a final judgment.

Signed December 15, 2006.

/s/ David C. Godbey
David C. Godbey
United States District Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SUSAN B. HERSH, Plaintiff,	§	
v.	§	Civil Action No.
UNITED STATES OF AMERICA, *et al.*,	§	3:05-CV-2330-N
Defendants.	§	

ORDER

(Filed Dec. 15, 2006)

Before the Court are the parties' cross-motions for summary judgment. [23, 26] For the reasons stated in the Court's Order of July 26, 2006, *Hersh v. United States,* 347 B.R. 19 (N.D. Tex. 2006), the Court grants Plaintiff Hersh's motion for summary judgment and denies Defendant United States' motion for summary judgment and for reconsideration.

The Fifth Circuit has recently restated the requirements for obtaining a permanent injunction:

> The party seeking a permanent injunction must meet a four-part test. It must establish (1) success on the merits; (2) that a failure to grant the injunction will result in irreparable injury; (3) that said injury outweighs any damage that the injunction will cause the

opposing party; and (4) that the injunction will not disserve the public interest.

VRCLLC v. City of Dallas, 460 F.3d 607, 611 (5th Cir. 2006). The Court finds that Plaintiff Hersh has succeeded on the merits of her claim regarding 11 U.S.C. § 526(a)(4). The Court further finds that failure to grant an injunction will result in irreparable injury to Hersh's First Amendment rights. *See Deerfield Med. Ctr. v. City of Deerfield Beach,* 661 F.2d 328, 338 (5th Cir.1981) (citing *Elrod v. Burns,* 427 U.S. 347, 373 (1976)) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). The Court further finds that the injury to Hersh's First Amendment rights outweighs any interest the government might have in enforcement of an overbroad statute. Finally, the Court finds that an injunction would not disserve the public interest, but would further the public interest in unfettered communication between attorney and client and in the enforcement of constitutional rights. Accordingly, the Court will permanently enjoin Defendants from enforcing 11 U.S.C. § 526(a)(4)

Signed December 15, 2006.

/s/ David C. Godbey
David C. Godbey
United States District Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SUSAN B. HERSH, Plaintiff,	§	
v.	§	Civil Action No.
UNITED STATES OF AMERICA, *et al.*,	§	3:05-CV-2330-N
Defendants.	§	

MEMORANDUM OPINION AND ORDER

(Filed Jul. 26, 2006)

Before the Court is Defendants' Motion to Dismiss. The Court holds that section 526(a)(4)'s restrictions on legal advice violate Hersh's First Amendment rights, but otherwise grants the motion to dismiss.

I. ORIGINS OF HERSH'S CLAIMS AND THE GOVERNMENT'S MOTION TO DISMISS

In 2005, Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA"). The act contains provisions arguably applicable to consumer bankruptcy attorneys and the manner in which they provide services to both potential and actual clients. Defendant Alberto Gonzales, Attorney General of the United States, and Defendant Greg Abbot, Attorney General of Texas, are the heads of the agencies charged with enforcing these

provisions. (Hereafter, the Defendants, i.e., the Attorneys General and their respective governments, will be collectively referred to as the "Government.")

Plaintiff Susan B. Hersh is a Dallas, Texas attorney whose practice includes counseling clients for a fee regarding federal bankruptcy law. She brings this cause of action both seeking declaratory judgement that the BAPCPA does not apply to attorneys and as a facial challenge to the constitutionality several provisions. The provisions at issue are: 11 U.S.C. § 526(a)(4), which prohibits attorneys from giving certain advice to their clients;[1] and 11 U.S.C. § 527, which requires specific disclosures by providers of bankruptcy assistance.[2]

The Government subsequently filed this motion seeking to dismiss all Hersh's claims.

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[1] Plaintiff's Amended Complaint makes no express mention of 11 U.S.C. § 526; however, both sides argue the constitutionality of section 526 at great length, apparently believing it to be within the scope of Hersh's claims. Consistent with the parties' treatment, the Court will address section 526. The Court grants Hersh leave to amend her complaint to include an express claim for relief that 11 U.S.C. § 526(a)(4) violates the First Amendment.

[2] In her complaint, Hersh also alleges that 11 U.S.C. § 528 is unconstitutional on grounds similar to those alleged for section 527. However, in her response, Hersh makes no effort to refute the Government's argument that her section 528 claims present no basis for relief. Accordingly, the Court grants the Government's motion with respect to all of Hersh's claims pertaining to 11 U.S.C. § 528.

II. Standard for Motion to Dismiss

Where a party fails to state a claim upon which relief can be granted, dismissal pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure is appropriate. See Fed. R. Civ. P. 12(b)(6). When ruling on a Rule 12(b)(6) motion, courts must accept all well pleaded facts as true and view them in the light most favorable to the nonmovant. *See Calhoun v. Hargrove,* 312 F.3d 730, 733 (5th Cir. 2002); *Campbell v. City of San Antonio,* 43 F.3d 973, 975 (5th Cir. 1995).[3]

III. The Term "Debt Relief Agency" Includes Attorneys

Hersh's first claim seeks declaratory judgement that she, a licensed attorney advising clients on bankruptcy, is not a "debt relief agency" as defined in 11 U.S.C. § 101. Paragraph 12A of section 101 defines debt relief agency as "any person who provides any bankruptcy assistance to an assisted person in return

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[3] In a footnote, the Government raises the issue of whether Hersh has standing to bring these claims, as no entity has taken action to enforce BAPCPA against Hersh. Given the First Amendment concerns alleged here, such an action is unnecessary. Specifically, Hersh alleges that her speech is simultaneously stifled and compelled by the provisions at issue; the alleged suppression of Hersh's speech since the enactment of the BAPCPA is itself enough to provide standing. *See Center for Individual Freedom v. Carmouche,* 449 F.3d 655, 659-660 (5th Cir. 2006) (finding nonprofit group had standing to challenge law that had potential chilling effect on speech, citing *Virginia v. Am. Booksellers Ass'n,* 484 U.S. 383, 392 (1988)).

for the payment of money or other valuable consideration, or who is a bankruptcy petition preparer under section 110. . . . " 11 U.S.C. § 101(12A). The paragraph then continues to list five exceptions to the general definition. *Id.* at (A-E). Section 101 also defines "bankruptcy assistance" as

> any goods or services sold or otherwise provided to an assisted person with the express or implied purpose of providing information, advice, counsel, document preparation, or filing, or attendance at a creditors' meeting or appearing in a case or proceeding on behalf of another or providing legal representation with respect to a case or proceeding under this title.

11 U.S.C. § 101(4A).[4]

A reading of the text for plain meaning indicates that the term "debt relief agency" includes bankruptcy attorneys such as Hersh. Plain meaning is the preferred method for interpreting statutory language. *See Lamie v. U.S. Trustee,* 540 U.S. 526, 534 (2004); *Sutton v. United States,* 819 F.2d 1289, 1292-1293 (5th Cir. 1987). Here, as only attorneys are authorized to provide legal advice and "providing legal

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[4] Section 101 also defines "assisted person" as "any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than $150,000." 11 U.S.C. § 101(4A). Accordingly, this Court's holding that the term "debt relief agency" applies to Hersh does not necessarily mean it applies to all attorneys.

advice" is part of the definition of bankruptcy assistance, it seems clear that bankruptcy attorneys such as Hersh fit within the definition of "persons providing bankruptcy assistance." Attorneys also provide most of the other functions defined as "bankruptcy assistance."

Hersh argues that attorneys should be excluded from the above reading due to seeming inconsistencies their inclusion would cause in other parts of the statute.[5] Any inferences possibly created by imprecise drafting are surely overwhelmed by the plain language. Moreover, after the above stated definition for "debt relief agency," the paragraph continues to list five exceptions; if Congress had wanted attorneys excluded from the term "debt relief agency" (and, as a result, the requirements of BAPCPA at issue here) it surely would have taken this opportunity to exclude them from what otherwise they are so plainly within.[6]

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[5] First, she points out that the definition of debt relief agency, while broad enough to include both attorneys and bankruptcy petition preparers, only specifically mentions bankruptcy petition preparers. Also, Hersh argues that it would be counterintuitive to require an attorney as a debt relief agency to provide a statement under 11 U.S.C. § 527(b) telling his or her clients they have a right to an attorney and that only attorneys can provide legal advice.

[6] For a more detailed discussion of the meaning of "debt relief agency" within BAPCPA, see Robert Wann, Jr., *"Debt Relief Agencies:" Does the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 Violate Attorneys' First Amendment Rights?*, 14 AM. BANKR. INST. L. REV. 273, 274-283 (2006).

Further, legislative history clearly indicates that Congress had attorneys in mind with this statute; the House Report on the BAPCPA mentions "attorney" 164 times. H.R. REP. 109-31, *reprinted in* 2005 U.S.C.C.A.N. 88.[7] Accordingly, the Court grants the Government's motion to dismiss with respect to Hersh's claim for declaratory judgement that she is not a debt relief agency.

IV. 11 U.S.C. § 526(A)(4) UNCONSTITUTIONALLY RESTRICTS HERSH'S SPEECH

A. Standards to Apply in Determining Constitutionality of Restrictions on Speech

The most significant portions of the parties' briefing concerns 11 U.S.C. § 526(a)(4). This section provides:

> (a) A debt relief agency shall not – . . . (4) advise an assisted person or prospective assisted person to incur more debt in contemplation of such person filing a case under this title or to pay an attorney or bankruptcy petition preparer fee or charge

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[7] As part of the factors motivating passage of BAPCPA, the House Report also cites "[a] civil enforcement initiative undertaken in 2002 . . . [that] has 'consistently identified' such problems as 'debtor misconduct and abuse, *misconduct by attorneys* and other professionals, problems associated with bankruptcy petition preparers, and instances where a debtor's discharge should be challenged.'" 2005 U.S.C.C.A.N at 92 (emphasis added).

> for services performed as part of preparing for or representing a debtor in a case under this title.

11 U.S.C. § 526(a)(4).

The parties dispute two issues with respect to section 526(a)(4): whether the Court ought to apply strict scrutiny or a more lenient standard to determine the section's constitutionality, and whether the section meets whichever standard is applied. Because the Court finds that section 526(a)(4) does not survive scrutiny under the more lenient standard, it need not decide the first question.

The arguments of the parties lay out two alternative tests for use to determine the constitutionality of section 526(a)(4). Traditionally, courts subject content-based restrictions on speech to strict scrutiny. Strict scrutiny requires the regulation of speech to be (1) narrowly tailored to promote (2) a compelling government interest. *See United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000). Here, the Government proposes that section 526(a)(4) is an ethical regulation, and thus subject to a lesser standard outlined in *Gentile v. State Bar of Nev.*, 501 U.S. 1030 (1991).[8]

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[8] Neither 11 U.S.C. § 526(a)(4) nor any other part of the section purports to be an ethical standard. The section is titled "Restrictions on debt relief agencies" and definitively outlines required and prohibited actions. *Compare with Gentile*, 501 U.S. at 1065-76 (finding constitutional the standard enunciated by

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In *Gentile,* the Court faced the question of whether a test used by the Nevada Supreme Court in regulating attorney statements to the press violated the First Amendment. It found that the state's test achieved a "constitutionally permissible balance" because it (1) served "the State's legitimate interest in regulating the activity in question" and (2) "impose[d] only narrow and necessary limitations on lawyers' speech." *Id.* at 1075. The balancing test in *Gentile* and the strict scrutiny test appear to share the requirement that any restrictions on speech be narrow.

B. Section 526(a)(4) is Not Sufficiently Narrow

In enacting BAPCPA, Congress sought to remedy abuse of the bankruptcy system. With regards to section 526(a)(4), the Government alleges that Congress sought to end the manipulation of the system by certain filers who took on additional debt prior to bankruptcy. However, rather than changing the system to close the loopholes or penalize those who take on such debt, Congress in section 526(a)(4)

Nevada Supreme Court to distinguish permissible and impermissible communication with the press) *and Canatella v. Stovitz,* 365 F. Supp. 2d 1064 (N.D. Cal. 2005) (utilizing *Gentile* test in holding state bar statutes and professional rules not unconstitutional). Accordingly, the Court alternatively holds that strict scrutiny applies to 11 U.S.C. § 526(a)(4) and that the provision fails under strict scrutiny for the same reasons it fails the more lenient test, as explained below.

enacted a prophylactic rule, banning the bankruptcy attorneys from advising their clients to take on additional debts "in contemplation" of bankruptcy. Thus, section 526(a)(4) prevents lawyers from advising clients to take actions that are lawful, even under BAPCPA.

Moreover, taking on additional debt "in contemplation" of bankruptcy does not necessarily constitute abuse. While the Government argues that taking on additional debt *may* harm a debtor in some cases, it seems obvious that this also means that in some other cases, it *may* not. (Defendants' Reply 5-6). Without addressing all the complexities of bankruptcy law, it seems quite possible that sometimes taking on more debt could be the most financially prudent option for someone considering bankruptcy. That situation could be the case when: (1) refinancing at a lower rate to reduce payments and forestall or even prevent entering bankruptcy, or (2) taking on secured debt such as loan on an automobile that would survive bankruptcy and also enable the debtor to continue to get to work and make payments. Thus, section 526(a)(4) prevents lawyers from giving clients their best advice.[9]

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[9] Section 526(a)(4) may also work to deprive courts, as well as clients, of good counsel. The interactions of constantly shifting bankruptcy provisions may cause situations to arise in which a legal yet otherwise counterintuitive behavior is in the client's best financial interest. Section 526(a)(4) prevents attorneys from presenting those options to their clients and

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Section 526(a)(4), therefore, is overinclusive in at least two respects: (1) it prevents lawyers from advising clients to take lawful actions; and (2) it extends beyond abuse to prevent advice to take prudent actions. Thus, section 526(a)(4) of the BAPCPA imposes limitations on speech beyond what is "narrow and necessary." *Gentile,* 501 U.S. at 1075; *see also In re R. M. J.,* 455 U.S. 191, 203 (1982) (Even under intermediate scrutiny, "[s]tates may not place an absolute prohibition on certain types of potentially misleading information . . . if the information also may be presented in a way that is not deceptive."); *Conant v. Walters,* 309 F.3d 629, 638-39 (9th Cir. 2002) (finding that government could not justify policy that threatened to punish a physician for recommending to a patient the medical use of marijuana on ground that such a recommendation might encourage illegal conduct by the patient). Accordingly, the Court finds 11 U.S.C. § 526(a)(4) facially unconstitutional and denies the Government's motion to dismiss Hersh's claim.

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ultimately to the courts. "By seeking to prohibit the analysis of certain legal issues and to truncate presentation to the courts, the enactment under review prohibits speech and expression upon which the courts must depend for the proper exercise of judicial power." *Legal Services Corp. v. Velazquez,* 531 U.S. 533, 545 (2001). More succinctly put, "[a]n informed, independent judiciary presumes an informed, independent bar." *Id.*

V. 11 U.S.C. § 527 Does Not Unconstitutionally Compel Speech

In 11 U.S.C. § 527, BAPCPA requires attorneys to provide "assisted persons" with written notice of specified information regarding bankruptcy. In particular section 527(b) states:

> A debt relief agency providing bankruptcy assistance to an assisted person shall provide each assisted person at the same time as the notices required under subsection (a)(1) the following statement, to the extent applicable, or one substantially similar. The statement shall be clear and conspicuous and shall be in a single document separate from other documents or notices provided to the assisted person:[10]

11 U.S.C. § 527(b). The required statement is set forth in the margin.[11]

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[10] The notices in subsection (a)(1) must be provided "before commencement of a case" per 11 U.S.C. § 342(b)(1). *See* 11 U.S.C. § 527(a).

[11] The required statement is set forth as follows:

"IMPORTANT INFORMATION ABOUT BANKRUPTCY ASSISTANCE SERVICES FROM AN ATTORNEY OR BANKRUPTCY PETITION PREPARER.

"If you decide to seek bankruptcy relief, you can represent yourself, you can hire an attorney to represent you, or you can get help in some localities from a bankruptcy petition preparer who is not an attorney. THE LAW REQUIRES AN ATTORNEY OR BANKRUPTCY PETITION PREPARER TO GIVE YOU A

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WRITTEN CONTRACT SPECIFYING WHAT THE ATTORNEY OR BANKRUPTCY PETITION PREPARER WILL DO FOR YOU AND HOW MUCH IT WILL COST. Ask to see the contract before you hire anyone.

"The following information helps you understand what must be done in a routine bankruptcy case to help you evaluate how much service you need. Although bankruptcy can be complex, many cases are routine.

"Before filing a bankruptcy case, either you or your attorney should analyze your eligibility for different forms of debt relief available under the Bankruptcy Code and which form of relief is most likely to be beneficial for you. Be sure you understand the relief you can obtain and its limitations. To file a bankruptcy case, documents called a Petition, Schedules and Statement of Financial Affairs, as well as in some cases a Statement of Intention need to be prepared correctly and filed with the bankruptcy court. You will have to pay a filing fee to the bankruptcy court. Once your case starts, you will have to attend the required first meeting of creditors where you may be questioned by a court official called a 'trustee' and by creditors.

"If you choose to file a chapter 7 case, you may be asked by a creditor to reaffirm a debt. You may want help deciding whether to do so. A creditor is not permitted to coerce you into reaffirming your debts.

"If you choose to file a chapter 13 case in which you repay your creditors what you can afford over 3 to 5 years, you may also want help with preparing your chapter 13 plan and with the confirmation hearing on your plan which will be before a bankruptcy judge.

"If you select another type of relief under the Bankruptcy Code other than chapter 7 or chapter 13, you

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The Supreme Court has previously addressed statutes that require a member of a profession to provide customers with factual information regarding provided services. *See, e.g., Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781 (1988) (licensed fundraisers); *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833 (1992) (doctors providing abortions). Clearly, section 527 implicates the professional's First Amendment rights not to speak. *See Wooley v. Maynard*, 430 U.S. 705 (1977) (First Amendment rights "include[ ] both the right to speak freely and the right to refrain from speaking at all."); *Riley*, 487 U.S. at 797-98 ("[C]ases cannot be distinguished simply because they involved compelled statements of opinion while here we deal with compelled statements of 'fact': either form of compulsion burdens protected speech.") Yet, as members of a licensed profession, attorneys and other professionals are subject to regulation of their professional activities by the state, which may extend to speech. *See Riley*, 487 U.S. at 799; *In re Sawyer*, 360 U.S. 622, 646-47 (1959) (Stewart, J., concurring); *Innovative*

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will want to find out what should be done from someone familiar with that type of relief.

"Your bankruptcy case may also involve litigation. You are generally permitted to represent yourself in litigation in bankruptcy court, but only attorneys, not bankruptcy petition preparers, can give you legal advice."

11 U.S.C. § 527(b).

Database Sys. v. Morales, 990 F.2d 217, 221 (5th Cir. 1993).

In *Riley,* the Supreme Court applied strict scrutiny to invalidate a North Carolina law requiring that "professional fundraisers disclose to potential donors, before an appeal for funds, the percentage of charitable contributions collected during the previous 12 months that were actually turned over to charity." *Riley,* 487 U.S. at 795-96. The Court found that "the compelled disclosure will almost certainly hamper the legitimate efforts of professional fundraisers to raise money for the charities they represent," that the "provision necessarily discriminates against small or unpopular charities," and that "more benign and narrowly tailored options are available." *Id.* at 799-800. The Court concluded that the means chosen to achieve the state's interest in full disclosure were "unduly burdensome and not narrowly tailored." *Id.* at 798; *see also Tex. State Troopers Ass'n, Inc. v. Morales,* 10 F. Supp. 2d 628, 633-34 (N.D. Tex. 1998) (relying on *Riley* to find "the Court must hold unconstitutional a mandatory disclosure provision directed towards solicitation where more benign and narrowly tailored options are available.")

In *Casey,* a more closely analogous circumstance, a plurality of the Court upheld a Pennsylvania provision requiring doctors to provide a woman seeking an abortion with "truthful, nonmisleading information" about the procedure, health risks, conditions surrounding her pregnancy, and the availability of state provided information. *Casey,* 505 U.S. at 881-82. In

upholding the provision, the Court recognized a substantial government interest in providing a women with the risks of the procedure and a legitimate interest in ensuring a "mature and informed" decision. *Id.* at 882-83. Further, requiring the doctors to provide information presented no "substantial obstacle" and was not an "undue burden." *Id.* at 883.

In the case at hand, section 527 advances a sufficiently compelling government interest and does not unduly burden either the attorney-client relationship or the ability of a client to seek bankruptcy. The government clearly has a legitimate interest in attempting to ensure that a client is informed of certain basic information before he or she commences a case in bankruptcy. The amount of debt discharged by bankruptcy in a given year can be tens of billions of dollars, H.R. REP. 109-31, *reprinted in* 2005 U.S.C.C.A.N. 88, 91, and as among consumer creditors, attorneys, and their debtor clients, the consumer debtor is often at an informational disadvantage. Thus, the government interest is significant.

Given that significant interest, the compelled speech of section 527 is a reasonable burden. Hersh argues that many of the paragraphs within the required statement provide false or misleading information.[12] But in an area of law as intricate as

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[12] For example, Hersh argues that it is misleading to provide a client with a statement informing the client that he or she "will have to pay a filing fee to the bankruptcy court," as required by section 527(b), without mentioning that Federal

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bankruptcy, a generalized statement may often require further explanation by a client's attorney.[13] Nothing in section 527 prevents this. Further, the section itself provides that the statement may be altered, so long as the content is "substantially similar," and that the statements need only be provided "to the extent applicable." 11 U.S.C. § 527(b). This leaves the bankruptcy attorney with sufficient control of the distribution of the messages of the statement to avoid any undue burden. *See Fargo Women's Health Org. v. Schafer,* 18 F.3d 526, 532-34 (8th Cir. 1994) (upholding provision requiring doctors to provide information and where physicians may comment on or dissociate themselves from the materials.) Finally, unlike in *Riley,* the provision neither acts as a barrier inhibiting the ability of a potential client to seek relief nor disproportionately impacts the ability of certain attorneys to serve their clients. The factual, viewpoint-neutral statement provides a sufficiently benign and narrow means of ensuring that clients are aware of certain general information regarding

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Rule of Bankruptcy Procedure 1006(b) may permit such fees to be deferred.

[13] Hersh alleges concerns about possible negative implications created by omitted details. These concerns are not enough to invalidate section 527. *See, e.g., Fargo Women's Health Org. v. Schafer,* 18 F.3d 526, 533-34 (8th Cir. 1994) (When requiring doctors to provide information, "[i]f in certain cases such a statement would be misleading or false, it would undoubtedly be because of unique and personal background facts that would be at least suspected if not known to the woman.") The simple cure to incomplete information is advice of counsel.

bankruptcy. Accordingly, the Court grants the Government's motion to dismiss Hersh's claim that 11 U.S.C. § 527 violates the First Amendment.

VI. Hersh Does Not have Standing to Assert Fifth Amendment Claims

In addition the First Amendment issues raised above, Hersh also alleges in her complaint that the discussed provisions are unconstitutional on Fifth Amendment grounds, namely the right to retain counsel in civil matters. *See Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1118 (5th Cir. 1980). The Government moves to dismiss these claims for lack of standing, arguing that Hersh may not assert the right to counsel on behalf of her prospective clients. *See Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004).

Standing is an element of subject matter jurisdiction and, accordingly, should be addressed prior to any determination of the claim's constitutionality. *See Sample v. Morrison*, 406 F.3d 310, 312 (5th Cir. 2005); *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001) ("When a Rule 12(b)(1) motion is filed in conjunction with other Rule 12 motions, the court should consider the Rule 12(b)(1) jurisdictional attack before addressing any attack on the merits.") "The burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction." *Id.*

In her response, Hersh concedes that she does not have standing to assert the right to counsel on behalf of her clients. (Plaintiff's Resp. n.6). Instead,

she asserts, without legal authority, (1) that the right to counsel includes a right to "unvarnished" legal advice, and (2) that the protection of this new right must mean that Hersh, as a bankruptcy lawyer, has the right to *provide* counsel. The Court declines to twice extend a recognized right on its own initiative as required in order to provide Hersh with standing for her Fifth Amendment claims. Accordingly, the Court grants the Government's motion to dismiss with respect to all Hersh's claims based on the Fifth Amendment right to counsel.

VII. CONCLUSION

The Court dismisses with prejudice Hersh's claims regarding "debt relief agency," sections 527 and 528, and the Fifth Amendment. The Court denies the Government's motion to dismiss Hersh's section 526(a)(4) First Amendment claim. The Court invites Hersh to move for summary judgement on that claim once she amends her complaint to assert it explicitly.

Signed July 26, 2006.

/s/ David C. Godbey
David C. Godbey
United States District Judge

Supreme Court, U.S.
FILED
MAY 4 - 2009
OFFICE OF THE CLERK

No. 08-1174

In the Supreme Court of the United States

SUSAN B. HERSH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

ELENA KAGAN
Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
MARK B. STERN
MARK R. FREEMAN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Section 526(a)(4) of Title 11 of the United States Code provides that bankruptcy professionals who qualify as "debt relief agencies" and who are hired by consumer debtors for bankruptcy services may not advise those debtors "to incur more debt in contemplation of" filing a bankruptcy petition. The question presented is whether Section 526(a)(4), construed with due regard for principles of constitutional avoidance, violates the First Amendment.

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In the Supreme Court of the United States

No. 08-1174

SUSAN B. HERSH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-54) is reported at 553 F.3d 743. The memorandum opinion and order of the district court denying in part the government's motion to dismiss (Pet. App. 61-78) is reported at 347 B.R. 19.

JURISDICTION

The judgment of the court of appeals was entered on December 18, 2008. The petition for a writ of certiorari was filed on March 18, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case concerns 11 U.S.C. 526(a)(4), a provision of the Bankruptcy Code that regulates paid bankruptcy advice. Congress enacted Section 526(a)(4) as

part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Pub. L. No. 109-8, 119 Stat. 23, "a comprehensive package of reform measures" designed "to improve bankruptcy law and practice by restoring personal responsibility and integrity in the bankruptcy system and ensure that the system is fair for both debtors and creditors." H.R. Rep. No. 31, 109th Cong., 1st Sess. Pt. 1, at 2 (2005) (*House Report*). Described by the House Report as "the most comprehensive set of [bankruptcy] reforms in more than 25 years," *id.* at 3, the BAPCPA both modified the substantive standards for bankruptcy relief and adopted new measures intended to curb a variety of abusive practices that Congress concluded had come to pervade the bankruptcy system.

After extensive hearings, Congress determined that misleading and abusive practices by bankruptcy professionals, including attorneys, had become a substantial cause of unnecessary bankruptcy petitions, and that such practices had sometimes jeopardized debtors' ability to obtain a discharge of their debts. For example, Congress heard evidence that a civil enforcement initiative undertaken by the United States Trustee Program had "consistently identified * * * misconduct by attorneys and other professionals" as among the sources of abuse in the bankruptcy system. *House Report* 5 (citation omitted). Congress responded by "strengthening professionalism standards for attorneys and others who assist consumer debtors with their bankruptcy cases." *Id.* at 17.

The BAPCPA added or strengthened several restrictions on bankruptcy professionals' conduct. Those restrictions are intended to protect the clients and prospective clients of bankruptcy professionals, the credi-

tors of clients who do enter bankruptcy, and the bankruptcy system. The pertinent provisions require additional disclosures to clients about their rights and the professional's responsibilities; they protect clients against being overcharged, or charged for services never provided; and they discourage misuse of the bankruptcy system. See, *e.g.*, 11 U.S.C. 110(b)-(h), 526-528, 707(b)(4)(C)-(D). Many of the BAPCPA's requirements and prohibitions apply equally to bankruptcy attorneys, to bankruptcy petition preparers who are not attorneys, and to all other professionals who provide bankruptcy assistance to consumer debtors for a fee; those professionals are collectively termed "debt relief agenc[ies]." 11 U.S.C. 101(12A).[1]

Section 526 sets out four basic rules of professional conduct for debt relief agencies. Section 526(a)(1) requires debt relief agencies to perform all promised services. Section 526(a)(2) prohibits debt relief agencies from advising an assisted person to make statements that are untrue or misleading in seeking bankruptcy relief. Section 526(a)(3) precludes debt relief agencies from misrepresenting the services they will provide or the benefits and risks attendant to filing for bankruptcy. And Section 526(a)(4), the provision that is directly at issue here, states:

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[1] The term "bankruptcy assistance" is defined to include providing an "assisted person" with advice, counsel (including "legal representation"), or document preparation or filing assistance "with respect to a case or proceeding under" the Bankruptcy Code. 11 U.S.C. 101(4A). An "assisted person" is "any person whose debts consist primarily of consumer debts" and whose nonexempt property is worth less than a specified, inflation-adjusted amount, currently $164,250. 11 U.S.C. 101(3); see 11 U.S.C. 104(a); 72 Fed. Reg. 7082 (2007).

> A debt relief agency shall not * * * advise an assisted person or prospective assisted person to incur more debt in contemplation of such person filing a case under this title or to pay an attorney or bankruptcy petition preparer fee or charge for services performed as part of preparing for or representing a debtor in a case under this title.

11 U.S.C. 526(a)(4).

The principal remedy for violations of Section 526 is a civil action by the debtor to recover the debtor's "actual damages," including any fees already paid. 11 U.S.C. 526(c)(2). The statute also authorizes state attorneys general to sue for debtors' actual damages or for injunctive relief to prevent violations. 11 U.S.C. 526(c)(3). The bankruptcy court may also impose an injunction or an "appropriate civil penalty" for intentional or recurring violations, either on its own motion or at the request of the United States Trustee or the debtor. 11 U.S.C. 526(c)(5).

2. Petitioner is an attorney who advises consumer debtors about bankruptcy. Pet. App. 2-3. She filed this action against the United States to challenge the application of several BAPCPA provisions that regulate debt relief agencies' professional conduct, including the advice limitation in Section 526(a)(4). Petitioner contended that licensed attorneys are not "debt relief agencies" within the meaning of the statute even if they provide bankruptcy-related advice to debtors. She also argued that, to the extent the statute encompasses licensed attorneys, Section 526(a)(4) and other provisions of the BAPCPA violate the First Amendment. Pet. App. 4.

The district court denied the government's motion to dismiss the challenge to Section 526(a)(4), Pet. App. 61-

78; granted summary judgment for petitioner on that claim, *id.* at 59; and permanently enjoined enforcement of Section 526(a)(4), *id.* at 57, 60. Although the district court agreed with the government that an attorney may be a debt relief agency, *id.* at 66, the court held that Section 526(a)(4) is facially unconstitutional because it is "overinclusive," *id.* at 70; see *id.* at 66-70.

3. The court of appeals reversed in relevant part and upheld Section 526(a)(4) as facially constitutional. Pet. App. 1-56. The court also concluded that attorneys may fall within the statutory definition of "debt relief agency." *Id.* at 9-15.

a. The court of appeals concluded that Section 526(a)(4) can be construed in a way that both avoids any constitutional difficulty and focuses directly on Congress's acknowledged purpose in enacting it, *i.e.*, preventing attorneys from encouraging their clients to "load up" on debt to abuse the bankruptcy system. Pet. App. 30-38. The court noted that the term "in contemplation of bankruptcy" is often used as a term of art that connotes an intent to abuse the bankruptcy system. *Id.* at 30-31 (citing *Black's Law Dictionary* 336 (8th ed. 2004)). Indeed, a few years before Congress enacted the BAPCPA, the Fifth Circuit itself had described the abusive practice of "incurring card debt in contemplation of bankruptcy" with the term "loading up." *Id.* at 31 (quoting *AT&T Universal Card Servs.* v. *Mercer (In re Mercer)*, 246 F.3d 391, 421 n.43 (5th Cir. 2001) (en banc)). And the court noted numerous other American and English authorities supporting such a construction of the phrase "in contemplation of" in the bankruptcy context. *Id.* at 31 n.17 (citing *Milavetz, Gallop & Milavetz, P.A.* v. *United States*, 541 F.3d 785, 799-800 (8th Cir. 2008) (*Milavetz*) (Colloton, J., concurring in part and dissent-

ing in part), petition for cert. pending, No. 08-1225 (filed Apr. 3, 2009).

The court of appeals further explained that the structure of Section 526 supports the specialized interpretation described above. Pet. App. 32-34, 37-38. The court pointed out that violations of Section 526 may be remedied by awarding the debtor actual damages, which strongly suggests that the practices banned are practices that would actually harm the debtor. See *id.* at 34. The court further noted that Section 526(a)(4) was enacted alongside, and placed together with, "three other rules of professional conduct designed to protect debtors." *Id.* at 37-38 (citing 11 U.S.C. 526(a)(1)-(3)).

The court of appeals also observed that the legislative history and purpose of the BAPCPA supported the court's construction of Section 526(a)(4). Pet. App. 35-36. The court explained that numerous elements of the BAPCPA were demonstrably "intended to curb abuse," which the court took as further evidence that "as part of this plan, section 526(a)(4) is only meant to curb abusive practices." *Id.* at 36.

b. The court of appeals also explained that, even if its reading of Section 526(a)(4) were not the most natural interpretation of the statute, that reading would be compelled by the doctrine of constitutional avoidance. The court identified several cases in which this Court had adopted an arguably countertextual construction in order to avoid constitutional difficulties. Pet. App. 26-30 (citing *Zadvydas* v. *Davis*, 533 U.S. 678 (2001); *Boos* v. *Barry*, 485 U.S. 312 (1988); and *United States* v. *Witkovich*, 353 U.S. 194 (1957)). The court noted that the avoidance doctrine may even require giving "[a] restrictive meaning [to] what appear to be plain words." *Id.* at

26 (quoting *Witkovich*, 353 U.S. at 199) (first brackets in original).

Petitioner had argued that the text of Section 526(a)(4) is so unambiguous that no narrowing construction is possible. See Pet. App. 20. The court of appeals concluded, however, that "the language of [the statute] can and should be interpreted only to prohibit attorneys from advising clients to incur debt in contemplation of bankruptcy when doing so would be an abuse or improper manipulation of the bankruptcy system." *Id.* at 38; see *id.* at 26. The court explained that, on that reading, "[S]ection 526(a)(4) has no application to good faith advice to engage in conduct that is consistent with a debtor's interest and does not abuse or improperly manipulate the bankruptcy system." *Id.* at 38.

c. The court of appeals concluded that, if Section 526(a)(4) is construed in this manner, it is not facially unconstitutional. The court explained that a statute is not unconstitutionally overbroad unless the "overbreadth is substantial in relation to the statute's legitimate reach." Pet. App. 40 (citing *United States* v. *Williams*, 128 S. Ct. 1830, 1838 (2008)). Petitioner did not dispute that Congress could validly regulate the sort of advice to engage in abusive conduct that all parties agreed was covered by Section 526(a)(4). See *id.* at 21-26.[2] And under the court's narrowing construction, Sec-

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[2] The court noted various contexts in which the First Amendment permits Congress and the States to regulate that sort of unethical attorney advice. For instance, the First Amendment does not protect speech proposing an illegal transaction, and abusive accumulation of debt may amount to fraud or theft. See Pet. App. 23-24 (citing *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 496 (1982)). Further, the government has a sufficiently important interest in the judicial process, including the bankruptcy system, to

tion 526(a)(4) did not apply to *any* of petitioner's examples of speech that could not constitutionally be prohibited. *Id.* at 41.[3] Accordingly, the Fifth Circuit found it "clear that the potential for the statute to prohibit protected speech is not by any means *substantial* in relation to the statute's legitimate reach." *Id.* at 43.

d. The court of appeals acknowledged that a divided panel of the Eighth Circuit had reached the opposite conclusion on the same issues and had invalidated Section 526(a)(4) as applied to attorneys. Pet. App. 16-17 (citing *Milavetz, supra*). On that issue, the court stated, it "agree[d] with Judge Colloton's dissenting opinion" in the Eighth Circuit case. *Id.* at 10 n.6.

DISCUSSION

The government has filed its own petition for a writ of certiorari seeking review of the Eighth Circuit's decision invalidating Section 526(a)(4). Pet. at I, *United States* v. *Milavetz, Gallop & Milavetz, P.A.*, No. 08-1225 (filed Apr. 3, 2009). As that petition explains, the conflict between the Fifth and Eighth Circuits over the con-

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justify regulation of attorneys' unethical conduct affecting that process. See *id.* at 24-26 (citing *Gentile* v. *State Bar*, 501 U.S. 1030 (1991), and Model Rules of Prof'l Conduct R. 1.2(d)). The court explained that the abusive accumulation of debt in contemplation of bankruptcy "is akin to committing a fraudulent act," and therefore "Congress can constitutionally prevent attorneys or other debt relief agencies from advising their clients to [commit such an act]." *Id.* at 26.

[3] Petitioner had contended, and the district court agreed, that Section 526(a)(4) could not validly regulate advice to take on prebankruptcy debt under legitimate circumstances, such as advice to refinance a loan. Pet. App. 18, 69.

stitutionality of an Act of Congress warrants this Court's review.[4]

In the government's view, *Milavetz* provides the better vehicle to resolve the circuit conflict, and the petition in this case should therefore be held pending the disposition of *Milavetz*. The disagreement between the Fifth and Eighth Circuits as to the constitutionality of Section 526(a)(4) is rooted in those courts' divergent views on a statutory-interpretation issue that petitioner does not include in her questions presented. The government construes Section 526(a)(4) to regulate *only* advice to incur debt with the intention to abuse the bankruptcy system. The Eighth Circuit rejected that interpretation and, as a result, held that the statute is unconstitutionally overbroad. The court below adopted the narrowing construction and sustained the statute against petitioner's overbreadth challenge. Although the court below found that interpretive issue to be dispositive of the case, petitioner does not squarely address it.[5]

Instead of addressing the statutory question, petitioner presents two issues on which no circuit conflict

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[4] The government is providing petitioner's counsel with a copy of the government's petition for a writ of certiorari in *Milavetz*.

[5] To be sure, "granting certiorari to determine whether a statute is constitutional fairly includes the question of what that statute says." *Rumsfeld* v. *FAIR*, 547 U.S. 47, 56 (2006); see *United States* v. *Williams*, 128 S. Ct. 1830, 1838 (2008) (explaining that "[t]he first step in overbreadth analysis is to construe the challenged statute"). If the Court were to grant review in this case, it accordingly would have discretion to consider the proper interpretation of Section 526(a)(4) as a logical antecedent to the constitutional questions that petitioner presents. It would nevertheless be preferable to resolve the circuit conflict in a case where the petitioner has expressly sought this Court's review on the relevant interpretive question.

exists. First, petitioner appears to contend that Section 526(a)(4) is invalid even if it is given the narrowing construction adopted by the court of appeals in this case. See Pet. 14-15. No court has adopted that position. The Eighth Circuit concluded that the statute was unconstitutionally overbroad as applied to attorneys because that court construed the statute to extend to "appropriate and beneficial advice." *Milavetz*, 541 F.3d at 793. The Eighth Circuit majority did not dispute Judge Colloton's conclusion that the statute would be constitutional if a narrowing construction were adopted. See *id.* at 799 (Colloton, J., concurring in part and dissenting in part). And whereas the Eighth Circuit concluded only that Section 526(a)(4), capaciously construed, was overbroad *in relation to its legitimate sweep*, see 541 F.3d at 794 & n.10, petitioner appears to argue that Section 526(a)(4) has no legitimate application at all.

Second, petitioner contends that this Court should grant certiorari to decide what standard governs a First Amendment challenge to an ethical regulation on attorneys' conduct. See Pet. 12-14. Petitioner urges this Court to apply strict scrutiny, rather than the more deferential standard that the Court applied to attorneys' litigation conduct in *Gentile* v. *State Bar*, 501 U.S. 1030, 1071-1076 (1991). But the court below did not resolve that issue, see Pet. 13; nor did either the district court in this case or the Eighth Circuit in *Milavetz*, both of which stated that the overbreadth analysis would yield the same result under either strict scrutiny or the *Gentile* standard. See Pet. App. 17-18; *Milavetz*, 541 F.3d at 793.

The government's petition in *Milavetz* presents both the statutory and constitutional questions on which a circuit conflict exists. Depending on the manner in

which it construes Section 526(a)(4), the Court in *Milavetz* might have occasion to decide whether the *Gentile* standard applies in this context. But in the absence of a circuit conflict on that question (and, indeed, without the benefit of any holding on that question by any court of appeals), the issue does not warrant plenary review by this Court in its own right.

CONCLUSION

The Court should hold the petition for a writ of certiorari in this case pending its disposition of the petition for a writ of certiorari in *United States* v. *Milavetz, Gallop & Milavetz, P.A.*, No. 08-1225 (filed Apr. 3, 2009), and then dispose of this case accordingly.

Respectfully submitted.

ELENA KAGAN
Solicitor General
TONY WEST
Assistant Attorney General
MARK B. STERN
MARK R. FREEMAN
Attorneys

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